SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, PETITIONER,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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[fol. 1]

IN DISTRICT COURT OF KITTSON COUNTY, 14TH JUDICIAL DISTRICT, STATE OF MINNESOTA

UNION BROKERAGE COMPANY, a Corporation, Plaintiff,

vs.

NORMAN G. JENSEN and CURTIS M. RIME, Defendants

COMPLAINT—June 7, 1941

The plaintiff for its cause of action against the defendants alleges:

I

That since January 14, 1928, it has been, and still is, a corporation, duly organized and existing under the laws of North Dakota, to engage in and authorized to transact the business of a customhouse broker pursuant to U. S. A. C. Title 19; Section 1641, commonly referred to as the U. S. Tariff Act of 1930, as amended; and for carrying on said business the plaintiff has been and is now a licensed [fol. 2] customhouse broker as provided by said Tariff Act, within the customs district No. 34, which comprises parts of Minnesota and North Dakota in the United States of America.

II

That the defendants have been, and are now, engaged in the customhouse brokerage business at Noyes, Minnesota, under the name and style of "Norman G. Jensen, Custom House Broker," and under a customhouse broker license issued to defendant Jensen by the Secretary of the Treasury; and the defendant Rhime assists the defendant Jensen in the conduct of said customhouse brokerage business under a power of attorney made, executed and delivered by the defendant Jensen, as licensee, to the defendant Rhime as his attorney in fact, granting to said Rhime the power and authority to clear dutiable shipments in the name of the defendant Jensen as the licensee at Noyes, Minnesota where defendants have their principal place of business.

That said license of defendant Jensen, and the use thereof as hereinbefore alleged, were assigned by the defendant

Jensen to the plaintiff under the circumstances and for the considerations hereafter stated; and the use of said customhouse broker license as in this paragraph alleged has been made and is now made in willful and wrongful breach of contract, without the authority of the plaintiff, and in violation of the duties devolving on the said defendant Jen-
[fol. 3] sen as the managing agent of the plaintiff; and the defendant Rhime has at all times known and fully understood said corrupt conduct and abuse of power by said Jensen.

III

Plaintiff, under its articles of incorporation, is authorized and empowered to issue common stock of the total par value of $10,000.00 and has issued its capital stock to the amount in par value of $10,000.00, distributed as follows, to-wit:

To Nan W. Anderson, shares of the par value of $3,700.00;
To Annie Kramer, shares of the par value of $3,600.00;
To Fraser Mackay, shares of the par value of $100.00;
To Wm. Mackay, shares of the par value of $100.00;
To Norman G. Jensen, shares of the par value of $2,500.00;

and its present board of directors and officers are:

Nan W. Anderson, President and Treasurer and Director;
Annie Kramer, Vice President and Secretary;
Fraser Mackay, Vice President;
Wm. Mackay, Director.

[fol. 4] IV

Said corporation, as such licensed customhouse broker, until the occurrence of the events hereafter stated, carried on its said business at great profit to itself and its stockholders.

V

Plaintiff corporation was organized and founded by Carl Anderson and H. O. Kramer who died a short time prior to the 6th day of September, 1938. On their death their respective shares of stock in the plaintiff corporation owned by them at the time of their death was duly and lawfully assigned as follows: To Nan W. Anderson, surviving spouse

of Carl Anderson the shares of stock mentioned in paragraph III of this complaint as standing in her name; to Annie Kramer, surviving spouse of H. O. Kramer, and to Harry O. Kramer, surviving son of H. O. Kramer the shares of stock mentioned in paragraph III of this complaint as standing in their names and on succeeding to the said shares of stock they also succeeded to the control and management of the business of the plaintiff corporation.

That the plaintiff had been doing a profitable business since its organization, and had earned and possessed an honorable business record. That the net income of the plaintiff corporation provided for the holders of its stock sufficient and suitable support for the holders of its shares of stock up to January 1, 1940, since which last mentioned [fol. 5] date no dividends have been paid or distributed on said shares of stock because of the wrongs committed against the plaintiff by the defendants as hereafter alleged.

VI

That for some time prior to the 6th day of September, 1938, the defendant Jensen carried on the business of customhouse broker as an individual in competition with the plaintiff at Portal, in the State of North Dakota, and on or about September 6, 1938, the plaintiff and the defendant Jensen entered into an agreement by the terms of which the business of the plaintiff and the said Jensen was merged to be conducted thereafter by the defendant Jensen as the plaintiff's managing agent.

That by the terms of said agreement the defendant Jensen agreed with the plaintiff that he would cease to carry on his business of a customhouse broker, assign, and use his license for and in plaintiff's business, and transfer his business, clients and customers and good will to plaintiff and to cease doing business as an individual customhouse broker and conduct the business of customhouse brokerage exclusively in plaintiff's name and solely for its use, to enter into plaintiff's service and assume the office of acting as the plaintiff's managing agent for the consideration of 25 shares of plaintiff's capital stock fully paid, a salary of $3,000.00 per year, payable at the rate of [fol. 6] $250.00 per month and the dividends distributable on account of the 25 shares of stock to be issued and delivered to him by the plaintiff, all in consideration of his

acceptance of said employment as plaintiff's managing agent to the exclusion by him of all other gainful occupations and business pursuits.

That in execution of said agreement the plaintiff issued to the defendant Jensen 25 shares of its capital stock fully paid, of the par value of $2,500.00, elected him to be one of its three directors, its president and general manager, and paid him the promised salary of $250.00 per month. In consideration thereof, and in execution of said agreement, the defendant Jensen accepted said offices and shares of stock and assumed the duties of said offices of the plaintiff on or about September 6, 1938.

That a memorandum of said agreement was made and executed by the defendant Jensen, and delivered by him to the plaintiff wherein, for the consideration aforesaid, the defendant Jensen specifically covenanted and agreed to conduct the business of the plaintiff honestly and fairly and for the sole benefit of the plaintiff. That a true and correct copy of said memorandum agreement is annexed to this complaint and made a part thereof and identified as Plaintiff's Exhibit "A".

VII

That plaintiff's Board of Directors during the defendant's management of plaintiff's business, consisted of said [fol. 7] defendant Jensen, Mrs. Nan W. Anderson and Mrs. Annie Kramer. That said directors Anderson and Kramer were inexperienced in conducting plaintiff's business and justifiably relied on and reposed full confidence in defendant Jenser as plaintiff's managing agent, and justifiably believed that he would discharge his duties honestly and faithfully as plaintiff's general manager and president. And defendant Jensen, well knowing that his associate directors of the plaintiff were his inferiors in understanding said business and its needs, and that they relied on him and trusted him, his management and his recommendations, fraudulently taking advantage thereof and of his aforesaid positions as president and general manager of the plaintiff took complete and exclusive charge of plaintiff's business and completely controlled plaintiff, its business, books of accounts, lists of clients and customers, with their addresses, all while ostensibly acting, and falsely pretending to act for and on behalf of plaintiff as its manag-

ing agent, and in furtherance of his plan to acquire control of plaintiff, required the board of directors to elect him plaintiff's treasurer and thereby he corruptly acquired control of plaintiff to such an extent and degree that the plaintiff was converted by defendant Jensen to be his instrumentality; and said conversion became complete on or about January 1, 1939, from which last mentioned date said [fol. 8] defendant Jensen continuously and absolutely controlled the plaintiff, its affairs, books and property, until November 5, 1940, when said defendant Jensen was required by plaintiff to resign as its manager.

VIII

That it was the duty of the defendant Jensen, while serving the plaintiff as director, president, treasurer and general manager, to honestly, diligently, faithfully and carefully administer the affairs and business of the plaintiff; to exercise the highest and most scrupulous good faith in transacting plaintiff's business and to manage plaintiff's affairs for its exclusive benefit; to keep honest, accurate and correct books of account of all the business, income and transactions of the plaintiff while managing its affairs; to acquire no personal advantage to himself from the conduct of plaintiff's business; to see that the property, effects and money of the plaintiff were not stolen, embezzled, wasted, squandered or misappropriated; to make and present to the stockholders of the plaintiff true and accurate accounts and statements of plaintiff's affairs from time to time as required by law and by its articles of incorporation and its by-laws; to surrender and account to the plaintiff for all money and property earned and acquired by plaintiff in the course and within the scope of its aforesaid business, and to faithfully and with absolute loyalty and fidelity per-[fol. 9] form his duties in said offices of the plaintiff; to abstain from engaging in any competing business; to use his broker's license only for the good of the plaintiff; to withdraw from the funds and the business of the plaintiff nothing for his own use except the salary earned in attending to its business; to faithfully and to the best of his ability and opportunity promote, protect and advance the business of the plaintiff and to faithfully and diligently perform all other duties devolving on him as such director, president, treasurer and general manager of the plaintiff.

That after having obtained control of the plaintiff as aforesaid, and while falsely pretending to discharge the duties of his office as plaintiff's manager, the within named defendant maliciously combined and confederated together to defraud the plaintiff of its business and to convert and appropriate plaintiff's said business to and for the use of the defendants, and to take and appropriate to themselves all of plaintiff's money, earnings, income and property.

IX

That pursuant to said conspiracy, with the malicious and unlawful intent aforesaid, the defendants, and other persons to the plaintiff unknown, while pretending to carry on the business of the plaintiff in their said fiduciary positions, falsely, fraudulently, maliciously, secretly and wrongfully [fol. 10] betrayed the plaintiff and its stockholders, for the purpose and with the intent to deprive the plaintiff of its business and income and to appropriate the same to their own use; and to effectuate said taking and conversion of plaintiff's business, income, money, earnings and property, the defendants, combining and confederating together, did:

(a) In pursuance of said conspiracy the defendants wrongfully, dishonestly and corruptly withheld from the plaintiff important and necessary and valuable trade and business information among which is the decision of the Canadian Pacific Railway Company made in 1939, as plaintiff is informed and believes, to re-route its rail shipments over its lines from Canadian shipping points into the United States from Portal in North Dakota to Noyes in Minnesota, so that thereby the plaintiff was prevented from adjusting or expanding its offices and business machinery in time to take advantage of said change by moving from Portal, North Dakota to Noyes in Minnesota to serve in clearing shipments routed through the port of entry at Noyes, Minnesota, instead of Portal, North Dakota.

(b) On discovering the change in routing rail shipments of goods and merchandise requiring the payment of duty as aforesaid, in wanton disregard of defendants Jensen's duty in the premises, the defendants took and appropriated to themselves Plaintiff's list of Canadian and American ship- [fol. 11] pers of goods and merchandise requiring clearance at the American ports of entry in customs district #34 and

falsely, and with the fraudulent intent to cheat and defraud the plaintiff, induced such shippers, named in said list, to route their shipments into the United States through Noyes, Minnesota, and to consign said shipments away from plaintiff to the defendant Jensen;

(c) Visit plaintiff's established clients and railway freight agents, and with the intent to cheat and defraud the plaintiff of its business and income, falsely and fraudulently stated and represented to plaintiff's trade, clients and railway freight agents that plaintiff was not allowed or empowered to carry on the business of a customhouse broker at the port of Noyes, Minnesota, because the plaintiff had entered into an agreement, then in force, with one W. F. Mackay, by the terms of which agreement plaintiff had agreed to stay out of Noyes, Minnesota, and refrain from engaging in the business of a customhouse broker from and at said last named port of entry. That the defendants did then and there well know and understand that his said statements and representations were false; that no such agreement existed, but that plaintiff was duly empowered to do business at Noyes, Minnesota, and defendants uttered said false statements and representations maliciously with the wrongful intent to induce shippers of goods into the United States to route and consign their shipments to defendant [fol. 12] Jensen at Noyes, Minnesota, for clearance and to thereby deprive the plaintiff of its business, and to convert its said business and the profits therefrom to themselves.

(d) In breach of his aforesaid duties, and while falsely pretending to execute the duties of managing the affairs of this plaintiff, the defendant Jensen, wrongfully and fraudulently, aided and abetted by defendant Rhime, wilfully, wrongfully, maliciously, and for the purpose and with the fraudulent intent aforesaid, falsely stated and represented to plaintiff's clients and customers, but without the knowledge of or notice to the plaintiff, that he, the said Jensen, had opened an office as customhouse broker at Noyes, Minnesota, for himself, and, with the malicious and fraudulent intent aforesaid, requested the clients of the plaintiff to consign their shipments to him as their agent to clear such shipments at Noyes, Minnesota, all of which acts were done by the defendants while defendant Jensen paid himself the salary agreed upon for serving the plaintiff as its managing agent and president out of plaintiff's funds.

(e) Altered and changed bills of lading on shipments into the United States, consigned to the plaintiff, so that such shipments were made to appear, after such wrongful alterations, to have been originally consigned to the defendant Jensen at Noyes, Minnesota; and taking advantage of [fol. 13] said false and forged consignments, defendants corruptly cleared them for the profit of the defendants, and deprived the plaintiff of said fees, contrary to the authority vested in said defendant Jensen as plaintiff's manager.

(f) Solicited business for defendant Jensen, individually while falsely and fraudulently pretending to the plaintiff that defendant Jensen was carrying on the business and discharging the duties devolving on him as the managing agent of the plaintiff;

(g) Appropriated and used plaintiff's money spent by him and his confederate in carrying on said betrayal of the plaintiff by corruptly trying to deprive plaintiff of its business, and in converting it to the use of defendant Jensen as aforesaid;

(h) Appropriated, concealed, spirited away or destroyed plaintiff's books, lists of clients, records and correspondence, and refused to discover or deliver to plaintiff its said books, records and correspondence when demanded of him, in violation of his duties in the premises.

(i) Instructed the Canadian Pacific Railway Company to omit from its "Customs Circular" issued on July 25, 1940, the name of the plaintiff as a licensed customhouse broker for Noyes, Minnesota, and to substitute for the name of the plaintiff the name of the defendant Norman G. Jensen as the licensed customhouse broker at Noyes, Minnesota; and pursuant to said instructions and directions of the de- [fol. 14] fendant the said Canadian Pacific Railway Company omitted plaintiff's name from said customs circular issued by it on July 25, 1940 and inserted the name of the defendant Jensen in place of the name of this plaintiff in its said circular. That to effect said change, and to secure the insertion of his own name in place of plaintiff's name, the defendants, for the purpose and with the unlawful and wrongful, fraudulent and corrupt intent aforesaid, and to execute said wrongful conspiracy, falsely and fraudulently stated and alleged to the said Railway Company that plaintiff's business of customhouse brokerage at Noyes, Minne-

sota, was thereafter to be carried on in the name of defendant Jensen because the plaintiff did not have the customhouse broker license required to do business as customhouse broker in Minnesota. That said statements were known to be false when uttered by the defendants.

(j) While acting as the employee, and actually occupying the offices of president and manager of the plaintiff, and while in full and absolute charge and control of the plaintiff's affairs, the defendants without knowledge thereof by or notice to, the plaintiff, and without plaintiff's consent, agreed among themselves that the said Norman B. Jensen should grant to the defendant Rhime his power of attorney under which said Rhime should assist and act for and in the name of said Norman G. Jensen in conducting the business [fol. 15] of a customhouse broker at Noyes, Minnesota, in defendant Jensen's name; that said power of attorney was thereupon duly made and executed by said Norman G. Jensen, constituting and appointing the defendant Rhime his attorney in fact, and said defendant Rhime accepted said power and appointment as attorney in fact for the said Norman G. Jensen and duly filed said power of attorney with and in the office of the U. S. Collector of Customs, and ever since said defendants have operated said business at Noyes, Minnesota, in the name of defendant Jensen in violation of said Jensen's authority. That said power of attorney was made and filed as aforesaid at a time unknown to the plaintiff, but plaintiff alleges, on its information and belief, that it was made and filed as aforesaid on or about January 1, 1940. That said power of attorney was made, accepted and filed as aforesaid for the sole purpose of placing the defendant Rhime in position to assist, aid and abet the said Norman G. Jensen in cheating and defrauding the plaintiff of its business and income in execution of said unlawful, wrongful and fraudulent conspiracy, conceived and executed by the defendants for the purpose and with the intent to appropriate to themselves plaintiff's established business and income; and during all of said times, and when said acts were committed and until recent dates, the defendants falsely and fraudulently represented to the plain- [fol. 16] tiff that said Norman G. Jensen was honestly and faithfully attending upon the regular business of the plaintiff for its benefit and profit.

(k) Carried on a systematic and continuous plan of misrepresentation and slander of and concerning plaintiff and its business for the purpose and with the intent to undermine, impair, and ruin plaintiff's good will, business and earnings in breach of their duties aforesaid.

That during all of the time herein mentioned, and up to the 5th day of November, 1940, the defendants concealed from the plaintiff and its stockholders said acts of fraud and breach of duty and violations of his authority, and continued to draw the salary from plaintiff's treasury agreed to be paid by the plaintiff for the faithful and honest performance of his duties as plaintiff's managing agent; and to falsely state and represent, and hold himself out to plaintiff's stockholders and his associate directors as actively, consistently and continuously attending solely to the business of the plaintiff and to acting for it and its advantage in all his trips and activities. He visited various sections of Canada and the United States during said period of time and unlawfully embezzled plaintiff's funds by charging the expenses incurred by him on such travels to plaintiff and paid such expenses with money belonging to plaintiff, on the false and fraudulent representations that said payments were made by him to pay legitimate expenses in- [fol. 17] curred by him for the welfare of plaintiff and its business, while knowing that he was then and there, and on all of said trips and travels, engaged in inducing shippers of freight to divert their business from plaintiff to himself in all cases of shipments into the United States through Noyes as the port of entry, all in wilful violation of his authority and in wrongful breach of duty as plaintiff's executive officer and managing agent.

X

That by said wrongful and unlawful acts committed by the defendants, the entire capital, surplus, property, earnings and business of the plaintiff has been destroyed, the stock of plaintiff and its stockholders rendered worthless, and all of plaintiff's profitable business has become transferred to, and appropriated by, the defendants to their own name and use; and the defendants are now in possession and control of plaintiff's business, and of the income, money, earnings and profits therefrom and which in equity and good conscience are the property of this plaintiff.

XI

That by reason of the premises aforesaid the business now conducted by the defendants and all income and profits therefrom are in law and equity plaintiff's business and income, held and possessed by the defendants in trust for the use of the plaintiff and its stockholders.

[fol. 18]

XII

That the dates, details and circumstances whereby said defendants and their confederates have converted plaintiff's business and income into the name of defendant Jensen cannot be alleged with more particularity or detail because the records, books and papers pertaining to the transactions whereby said fraud was executed have been spirited away or taken by the defendants, as plaintiff is informed and believes, and are not now accessible or to be found although they have been seasonably and properly demanded to be returned to plaintiff's office, and by reason thereof the detailed information of said conversion of plaintiff's business and income by the defendants to their own use will have to be made hereafter pursuant to such legal rights as plaintiff may have to compel production of such records.

That the defendants, as plaintiff's trustees, have received and now receive and take in for the use of the plaintiff, a gross income as customhouse brokers, as plaintiff is informed and believes, $100.00 per day; that said income realized by defendants from the conduct of plaintiff's business, converted and fraudulently possessed by them, as aforesaid, is derived from operating plaintiff's brokerage business in the name of the defendant Jensen, in violation of his said agreement and of the duties and authority granted to defendant Jensen by the plaintiff; and the aggregate of the amount of money so withheld from plaintiff [fol. 19] and fraudulently converted by the defendants, to their own use as plaintiff is informed and believes, is $50,000.00. That the defendants in violation of the duties and agreements aforesaid take in, as trustees of the plaintiff, fees and compensation for the use of plaintiff on the average $50.00 to $100.00 a day; and that all thereof is received and held by the defendants in trust for the plaintiff. That said money and compensation is wrongfully received and disposed of by the defendants as their own income and is by them deposited to the credit of the defendants or to the credit of

persons unknown to the plaintiff in banks unknown to the plaintiff and wrongfully kept by defendants for their use. That all of said wrongs have been done by the defendants while pretending and representing falsely that they have been serving this plaintiff as its officers and agents.

That the defendants intend to, and will, unless restrained from so doing by this court, invest and so dispose of plaintiff's said business and income that all thereof will be concealed from and lost to the plaintiff whereby the plaintiff will be unable to recover any thereof. That it is the intention and plan of the defendants to defraud, cheat and deprive the plaintiff of its aforesaid money, property and income by the means aforesaid, and to permanently convert plaintiff's business to their own use.

That while the defendants carry on plaintiff's business [fol. 20] in the name of the defendant Jensen at and from Noyes, Minnesota, the defendant Jensen keeps himself concealed to escape plaintiff's demands for accounting and to avoid the service of process, all with the wrongful and unlawful intent to accomplish the appropriation of all money belonging to the plaintiff to the use of the defendants, and to cheat and defraud the plaintiff and its stockholders thereof.

XIII

That plaintiff's money, income and property acquired by and in the possession of the defendants have been invested, as plaintiff is informed and believes, by the defendants in their own name, or in the name of the defendant Jensen; that the record and account thereof is kept not in the plaintiff's books of account as they should be, but in books provided for and kept by defendant Jensen and said last mentioned books of account, records, and correspondence are concealed and withheld from this plaintiff.

That the books of account kept by the defendants in their own name disclose, as plaintiff is informed and believes, the amount of money taken in and the business done by the defendants in their own name for the use of the plaintiff, and that said books and records have been substituted by the defendants for the books provided by the plaintiff to be kept by the defendant Jensen for the plaintiff pursuant to [fol. 21] said agreement of September 6, 1938. That the defendants refuse plaintiff access to the records and books now kept by them in furtherance of said conspiracy, and

to effect said fraud and conversion; and plaintiff is the equitable owner of said books and records.

That the defendants have made many investments to their credit but such investments have been made with money belonging to the plaintiff, and by reason thereof the plaintiff is the true and equitable owner of all such investments. That said properties, as plaintiff is informed and believes, are situated principally in the village of Portal, North Dakota; that moneys taken in by the defendants have been deposited in several banks unknown to plaintiff with the intent to conceal from and deprive the plaintiff of the amount of such money and of the records of investments made for the use of the plaintiff. That the defendants refuse to account for said earnings and profits and also refuse to disclose the records kept by them of the money secured by them in violation of their duty; and the plaintiff is unable to discover and does not know, a more detailed description of the assets and money belonging to it; but the defendants have all of said records in their possession and under their control.

XIV

That because defendant Jensen violated his instructions and authority after acquiring control of plaintiff and its [fol. 22] business, effected by the means aforesaid, and because of his breach of duty as the trustee of plaintiff and its stockholders in perverting the management of plaintiff's affairs for his own advantage and to the great loss of the plaintiff and its stockholders the interests of the defendants are and have been since January 1, 1939, inimical to, and in conflict with, those of this plaintiff and its other stockholders, and by reason thereof this plaintiff and its stockholders, other than defendant Jensen, have had no notice, information or knowledge of the wrongs herein complained of until the same was disclosed to it on or about the 5th day of November, 1940; and on said last mentioned occasion plaintiff promptly demanded the resignation of defendant Jensen as plaintiff's manager, and also demanded of him that he state and render his account of the business done by him and pay over the money taken in by him in violation of his trust in the premises; that defendant Jensen resigned as manager but refused to state and render his account and refused to pay over to plaintiff said income, but continued to do business in his own name in violation

of his authority and in wilful breach of his duties and agreement.

XV

That plaintiff has no adequate remedy at law.

For its second cause of action plaintiff alleges:

[fol. 23] I

That it incorporates, and makes a part of this its second cause of action the allegations of paragraphs I to XIV both inclusive, to the same extent as if said allegations were herein re-alleged word for word.

II

That on January 10, 1940, plaintiff's board of directors declared a cash dividend and ordered said cash dividend to be paid forthwith, pursuant to which declaration Mrs. Annie Kramer and Mrs. Nan W. Anderson, stockholders were declared to own and to be entitled to receive money from the plaintiff as their dividends in the amount of $2,540.64 each. That the defendant Jensen was then and there president and treasurer of the plaintiff. That said dividends were ordered paid from profits realized on plaintiff's business during 1939, notwithstanding the defendant's wrongful acts aforesaid; that it was then and there the duty of the defendant Jensen to pay said dividends from the funds of the plaintiff under his control as plaintiff's treasurer and president; that sufficient funds were available to allow the payment of said cash dividends. That the defendant Jensen was allowed a cash dividend in the sum of $1,693.77 on account of the 25 shares given to him in consideration of his agreement to act as plaintiff's managing agent as herein alleged. That the dividend allowed to defendant Jensen was by him paid in full.

[fol. 24] That in breach of his duties, the defendant Jensen, failed and omitted to pay the dividends allowed to said Mrs. Anderson and Mrs. Kramer. That he did on the contrary wrongfully, unlawfully and fraudulently withhold the payment of said dividends to said Mrs. Anderson and Mrs. Kramer, and appropriated therefrom to his own use the sum of $2,000.00 as plaintiff is informed and believes, out of the amount of dividends allocated to said Mrs. Anderson and Mrs. Kramer, and paid to them the remainder. That

no part of said $2,000.00 has been paid to them, though payment thereof has been duly demanded and though said sum was due to them absolutely.

III

That the said Nan W. Anderson and Annie Kramer have duly assigned their aforesaid cause of action against the defendants to this plaintiff, and plaintiff is now the owner and holder of said claim, and entitled to the payment of said $2,000.00 with interest thereon at the rate of six per-cent per annum from January 10, 1941.

Wherefore, plaintiff demands judgment against the defendants as follows:

1. For a decree adjudging that the defendants now hold and use and have held and used since September 6, 1938, the license of customhouse broker, issued to the defendant Norman G. Jensen, in trust and for the use and benefit of [fol. 25] the plaintiff, and that all acts and all services rendered by him and under his direction, and all earnings and income resulting from the use and exercise of said license in the name of Norman G. Jensen, by him directly and by his agent, defendant Rhime, have been done and have accrued and enured as a trust to the credit of the plaintiff, and that all authority and power exercised by the defendant Rhime as attorney in fact for the defendant Jensen in said business of customhouse brokerage at Noyes, Minnesota, have been done and have enured to the credit of the plaintiff, and that the plaintiff is now and has ever been the owner of the income, money and profits derived from and in the said customhouse brokerage business carried on by the defendants at Noyes, Minnesota, under and by virtue of said license standing in the name of the defendant Norman G. Jensen.

2. That an account be taken, under the direction of this court, of the income and profits taken in and realized by the defendants from the customhouse brokerage business at Noyes, Minnesota, conducted by them in the name of Norman G. Jensen since January 1, 1939, to the date of the commencement of this action, and that the amount of profits found in said accounting to have been realized therefrom during said time, without crediting the defendants with any salary or other compensation, but crediting them [fol. 26] with the amount of dividends actually paid and

distributed on January 10, 1940, be adjudged to be and to have been impressed with the trust, and to be held by defendants as a trust fund, for the use and benefit of this plaintiff, and adjudging that the amount thereof, with interest thereon at the rate of six percent per annum figured on each monthly balance thereof, is due to and owned by the plaintiff.

3. That the amount found due on such accounting be adjudged to be paid by the defendants to the plaintiff, and that any and all property held by the defendants as property obtained by them by the use of any of such funds shall be adjudged to be the property of this plaintiff and held by the defendants in trust for the plaintiff and to be by the defendants, duly assigned, transferred and conveyed to the plaintiff as in said decree may be adjudged, including the rents and profits from any such trust property.

4. That the defendants and each of them, their agents and attorneys, be in the meantime enjoined from transferring, assigning, pledging, encumbering, giving away or otherwise disposing of all money and property possessed by them or under their control.

5. That the defendants be adjudged to assign and deliver to the plaintiff 25 shares of plaintiff's capital stock, and [fol. 27] the certificate therefor and adjudging that they have no title or interest in said shares of stock

6. That defendant Norman G. Jensen has forfeited all rights to compensation from the plaintiff and that he be adjudged to restore to plaintiff all moneys received or withdrawn by him from the treasury of the plaintiff, together with interest thereon at six percent per annum from the date of each withdrawal including withdrawals as "salary and expenses" made since January 1, 1939, and that plaintiff recover judgment against the defendants for the amount thereof.

7. That the defendants be adjudged to account to plaintiff for all moneys received during the pendency of this action and that the amount thereof be adjudged to be paid over to plaintiff.

8. That it have judgment for $2,000.00 against defendants for withholding and embezzling $2,000.00 of money due

and payable to Mrs. Nan W. Anderson and Mrs. Annie Kramer and assigned to the plaintiff.

9. That plaintiff be adjudged to recover general damages from the defendants in the sum of $25,000.00; and

10. That plaintiff be awarded and adjudged such further and additional relief as to the court may seem just and [fol. 28] equitable and that it recover its costs and disbursements in this action.

Dated June 7, 1941.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota. Lewis L. Drill and Lawrence Applebaum, Commerce Building, St. Paul, Minnesota, Attorneys for Plaintiff.

PLAINTIFF'S EXHIBIT "A"

I, Norman Gilbert Jensen, in consideration of receiving twenty-five (25) shares of the capital stock of the Union Brokerage Corporation of Portal, North Dakota, do hereby agree to turn over to the Union Brokerage Corporation all my right, title and interest in the customs brokerage business now conducted by me or under my name. I do hereby agree that all brokerage business in the future will be conducted under the name of and for the sole benefit of the Union Brokerage Company, a corporation of North Dakota, that I will not at any time engage privately or otherwise in any business that would compete with the general business and purpose of the Union Brokerage Company; I do hereby further agree not to hold or acquire any interest whatsoever, stock or otherwise in any other Broker or [fol. 29] Brokerage Company, which will compete with the Union Brokerage Company.

I do further agree to use my very best efforts to conduct the Union Brokerage Business for the benefit of the corporation, its officers, directors and stockholders; to give the daily conduct of its business my full time, best efforts and energy, and to operate and conduct said business in full compliance with the minutes and by-laws of the Union Brokerage Company.

It is understood that in consideration of the above stock

being issued to me and my wife as joint tenants, said stock is all fully paid, I will further give the officers and directors my full cooperation at all times, and will conduct said business with the full faith herein placed in me and will not at any time violate or take advantage of the fiduciary relationship which I now occupy by reason of my office in said corporation.

Norman G. Jensen.

Witnessed this 6th day of September, 1938. M. Carlson, H. O. Kramer. (Complaint duly verified.)

[fol. 30] In District Court of Kittson County

Separate Answer of Norman G. Jensen—June 30, 1941

Comes now the defendant, Norman G. Jensen, and for his separate answer to plaintiff's first cause of action alleges and shows to the court:

1.

Admits the allegations in paragraph I of plaintiff's first cause of action, but in that relation this defendant states that he is informed and believes, and, therefore, states the fact to be, that the plaintiff corporation is not now, and never has been, authorized to transact business within the state of Minnesota as a foreign corporation;

2

Denies that the defendants, Jensen and Rime, have been, and now are, engaged in the custom house brokerage business at Noyes, Minnesota, or elsewhere, under the name and style of "Norman G. Jensen, Custom House Broker," and in that relation alleges the fact to be that this answering defendant, Jensen, is now so engaged, and has been so engaged for some time last past, and that the defendant, Rime, is employed by him in his said business;

Admits that the answering defendant, Jensen, is a licensed customhouse broker, and admits that the defendant, Rime, is in his employ.

Admits that the defendant, Jensen, for reasons of business and convenience, has executed a power of attorney [fol. 31] to the defendant, Rime, to act in his name and

stead in and about the business of the defendant, Jensen, at Noyes, Minnesota;

Denies that the license issued to the defendant, Jensen, as a custom house broker, or the use thereof, was ever assigned to the plaintiff, and asserts that said license is not assignable, as the plaintiff at all times well knew;

Denies that the defendant, Jensen, is now or has ever used his said license in breach of any contract with the plaintiff, or in violation of any duties devolving upon the defendant, Jensen, in his relations to the plaintiff;

3

As to the allegations contained in paragraph 3 of plaintiff's first cause of action, this answering defendant admits that the plaintiff corporation has an authorized capital of ten thousand dollars ($10,000.00), but as to the present distribution of said stock, and as to who are the officers and directors thereof he has no knowledge or information sufficient to form a belief, and, therefore, denies the same;

4

Concerning the allegations contained in paragraph 4 of plaintiff's first cause of action, this defendant states that he has no knowledge or information sufficient to form a belief as to whether plaintiff's business was, or was not profitable prior to his connection therewith, and, therefore, denies the same;

[fol. 32]

5

As to the allegations contained in paragraph 5 of plaintiff's first cause of action, this answering defendant states that he has been informed that plaintiff corporation was organized by one Carl Anderson and one Henry J. Kramer, both of whom are now deceased;

Denies that one H. O. Kramer, sometimes known as Harry O. Kramer, was one of the organizers of said corporation as therein set forth, and alleges that said H. O. Kramer is a son of the said Henry J. Kramer, deceased; that as to how and to whom the stock of the deceased, Anderson and Kramer, was assigned, this defendant has no sufficient knowledge or information upon which to form a belief, and, therefore, denies the same, and puts plaintiff upon its proof;

6

This answering defendant admits that for some time prior to the sixth day of September, 1938, he carried on the business of custom house broker as an individual in competition with the plaintiff corporation at Portal, in the state of North Dakota, and nowhere else;

Denies that on or about the sixth day of September, 1938, he entered into an agreement with the plaintiff corporation, as alleged in paragraph 6 of plaintiff's cause of action, by the terms of which the business of the plaintiff and this answering defendant were merged to be conducted thereafter by the defendant, Jensen as plaintiff's managing [fol. 33] agent; and in that relation alleges the facts to be, that at or about said time this defendant sold his said business as a custom house broker at Portal, North Dakota, to the plaintiff, and received as consideration therefor twenty-five shares of the capital stock in plaintiff corporation, fully paid, and that thereupon, or thereafter this answering defendant was employed by the plaintiff at a fixed salary, and for the purposes of business and convenience was appointed and elected to certain offices in said corporation;

Denies that by the terms of any agreement this defendant, Jensen, agreed with plaintiff that he, the said Jensen, would cease to carry on business as a custom house broker; would assign his rights to plaintiff; would cease doing business as an individual custom house broker, and conduct the business of custom house brokerage exclusively in plaintiff's name, and solely for its use; and in this relation alleges the facts to be, that the defendant sold to plaintiff, in consideration of twenty-five shares of the capital stock of plaintiff corporation, his individual brokerage business operated at Portal, North Dakota, as then owned, operated, and conducted by him, and not otherwise; that in connection therewith this defendant, Jensen, agreed to conduct said business in the name of the plaintiff thereafter as an employee of the plaintiff, and that he, the said Jensen, did not thereafter engage in the business of individual custom house broker, or [fol. 34] otherwise, as a competitor of the plaintiff at Portal, North Dakota, solely and only;

7

Answering paragraph 7 of plaintiff's first cause of action, this defendant admits that plaintiff's board of directors was

constituted as therein alleged, but denies each and every other matter, and thing in said paragraph alleged;

8

With reference to the allegations set forth in paragraph 8 of plaintiff's first cause of action, this defendant admits upon his employment by the plaintiff corporation, and his election to certain offices in the plaintiff corporation, he agreed to perform the customary and usual duties of the holders of such offices which might thereupon devolve upon him by virtue of said offices, but otherwise denies each and every allegation, matter, and thing in said paragraph 8 of plaintiff's first cause of action;

9

Answering the allegations set forth in Paragraph 9 of plaintiff's first cause of action, this answering defendant denies each and every allegation, matter, and thing therein contained;

Further answering, this defendant states that at no time prior to defendant's resignation as an officer and employee of the plaintiff corporation was this plaintiff engaged in business as a custom house broker at Noyes, in the State of [fol. 35] Minnesota, and alleges that the business of the defendant as a custom house broker at Noyes, in the State of Minnesota, did not, and by reason of the nature thereof could not, compete with the business of the plaintiff as a custom house broker at Portal, North Dakota;

Denies that any competition between the plaintiff and defendant took place as such custom house brokers until after the defendant had severed his connection with the plaintiff corporation, and until the plaintiff corporation and its officers and directors, conniving with one William Mackay and one Fraser Mackay, established a business as custom house broker at Noyes, in the State of Minnesota, with the intent and purpose of competing with this defendant, and in order to harass and annoy the defendant, and to destroy his said business; and in this relation this defendant alleges that after he had established his business as a customhouse broker at Noyes, in the State of Minnesota, the plaintiff corporation and its officers and directors, and particularly Nan W. Anderson, Annie Kramer, and Harry O. Kramer, conspired and confederated with one William Mackay and

one Fraser Mackay, both of Noyes, Minnesota, to wreck and destroy the defendant's said business, and in furthering said conspiracy caused some of the stock of plaintiff corporation to be placed in the name of said William Mackay and said Fraser Mackay, so as to qualify them, the said [fol. 36] William Mackay and the said Fraser Mackay, to act as directors of said corporation, and then elect, or pretend to elect, the said William Mackay and the said Fraser Mackay, and each of them, as such directors;

That in carrying out said conspiracy the plaintiff corporation, and its officers, or some of them, together with the said William Mackay and Fraser Mackay, established a business as custom house broker at Noyes, in the State of Minnesota, in competition with the said defendant, under the management of the said William Mackay and the said Fraser Mackay;

That in furtherance of said conspiracy and such purpose the above named persons have ever since said time engaged in every form of unfair competition that they are capable of devising and which the circumstances permit, including the writing of slanderous communications to defendant's customers and clients, and to custom and railroad representatives and officials, and slashing and cutting of fees, and the making of derogatory statements with reference to the defendant and his business, and his business methods, all to defendant's great damage.

10

Answering the allegations set forth in Paragraphs 10, 11, 12, 13, 14, and 15 of plaintiff's first cause of action, this answering defendant denies each and every allegation, mat- [fol. 37] ter, and thing therein set forth;

Further answering, this defendant states that if the records, books, and papers of the plaintiff corporation have been concealed, destroyed, or spirited away, as alleged therein, the concealing, destruction, and spiriting away thereof was done without the knowledge, or consent, or participation of this answering defendant, and was contrary to his wishes and his interest; that upon being informed of the alleged concealment or removal of such records from plaintiff's office this answering defendant instituted a search therefor in connection with the public authorities of Burke County, North Dakota; that this an-

swering defendant has reason to believe that the alleged disappearance of such records was brought about by some person or persons connected with the plaintiff corporation other than this defendant, for the purpose of covering up and concealing wrongful transactions of said person or persons, other than this defendant, then connected with or employed by said corporation;

11

Save and except as hereinbefore admitted, qualified, or modified, this answering defendant denies each and every allegation, matter, and thing in plaintiff's said first cause of action.

Comes now the above named defendant, Norman G. Jen- [fol. 38] sen, and for his separate answer to plaintiff's second cause of action alleges:

1

That as to Paragraph 1 of plaintiff's said second cause of action, this answering defendant re-alleges and makes a part of this answer all of the allegations contained in Paragraphs 1 to 11, inclusive, of defendant's answer to plaintiff's first cause of action, to the same extent and with the same force and effect as if said allegations were herein re-alleged verbatim;

2

Answering Paragraph 2 of plaintiff's second cause of action, this answering defendant denies the same and alleges the facts to be that Mrs. Annie Kramer and Mrs. Nan W. Anderson, stockholders of plaintiff corporation, described therein, during the time and period set forth therein received all dividends either declared or to which they were entitled as stockholders from such corporation, and denies that this defendant at any time failed or omitted to pay to the said Mrs. Anderson and the said Mrs. Kramer any and all dividends to which they were then or at any time entitled;

3

Answering Paragraph 3 of plaintiff's second cause of action, this answering defendant states that he has no knowl-

edge or information sufficient to form a belief as to the truth thereof, and, therefore, denies the same.

[fol. 39] Wherefore, This defendant prays for judgment and decree of this court,

First: That the plaintiff take nothing by its first cause of action, or its second cause of action, or either of them, and that they, and each of them, and plaintiff's said complaint may be in all things dismissed.

Second: That he have and recover of and from the plaintiff his costs and disbursements herein.

Third: That he have and recover such other relief as to the court may seem just and equitable in the premises.

Dated this 30 day of June, 1941.

Robert W. Palda, Minot, North Dakota; Francis Murphy, Fargo, North Dakota, Attorneys for the Defendant.

(Answer duly verified.)

In District Court of Kittson County

Separate Answer of Curtis M. Rime—June 30, 1941

Comes now the above named defendant, Curtis M. Rime, and for his separate answer to plaintiff's first cause of action in its complaint alleges and shows to the court:

1

Admits that he has been and is now employed by the defendant, Norman G. Jensen, in the business of the said defendant, Jensen, acting as a custom house broker at [fol. 40] Noyes, in the State of Minnesota, and that pursuant to such employment, and as a matter of convenience and necessity, has received, and acts under, a power of attorney, made, executed, and delivered by the defendant, Jensen as a licensed customhouse broker, to this answering defendant as his attorney in fact, authorizing this answering defendant to act as such broker in the name and stead of the defendant, Jensen, operating as such licensee at Noyes, in the State of Minnesota;

Save and except as thus admitted this answering defendant denies each and every allegation, matter, and thing in plaintiff's said first cause of action.

Answering plaintiff's second cause of action, this answering defendant, Curtis M. Rime, alleges:

1

Re-alleges the denials and allegations herein set forth to plaintiff's first cause of action, the same as though the same were set out herein verbatim:

2

Denies each and every allegation, matter, and thing in plaintiff's said second cause of action.

Wherefore, This answering defendant demands judgment,

First: That the plaintiff take nothing by its first cause of action or by its second cause of action, and that the same, [fol. 41] and each of them, and the plaintiff's complaint may be in all things dismissed.

Second: That he shall recover from the plaintiff his costs and disbursements herein.

Third: That he have such other and further relief as the court may deem just and equitable in the premises.

Dated this 30 day of June, 1941.

Robert W. Palda, Minot, North Dakota; Francis Murphy, Fargo, North Dakota, Attorneys for the Defendant.

(Answer duly verified.)

In District Court of Kittson County

Reply to Separate Answer of Defendant Norman G. Jensen

For its reply to the separate answer of the defendant Norman G. Jensen, plaintiff alleges:

I

With reference to paragraph I, it alleges that it has at all times been a corporation organized and empowered to

transact business as a customhouse broker within customs district #34 of the United States of America, and said district embraces within its boundaries a part of the State of North Dakota and that part of the State of Minnesota in which Noyes is located. That its license as a customhouse broker is now, and has been, during all of the times here- [fol. 42] in involved, effective for and throughout said customs district #34. That the defendants and each of them, have at all times herein involved known and appreciated that the plaintiff has been at all times authorized to do business as a customhouse broker throughout said district #34.

In that connection plaintiff further alleges that it could and would have operated and transacted its aforesaid authority and powers as a licensed customhouse broker at Noyes, Minnesota, but for the fraudulent and wrongful conspiracy executed by the defendants as alleged in plaintiff's complaint.

That the defendants have at all times known and understood that plaintiff could and would have conducted openly its business as customhouse broker at Noyes, Minnesota, but for the wrongful breach of duty by defendant Jensen, aided and abetted by defendant Rime, as alleged in plaintiff's complaint.

And plaintiff further alleges that the laws of the United States of America governing the plaintiff as a licensed customhouse broker within and for said district provide:

> "Art. 1396. License For More Than One Customs District. Separate licenses shall be required if the licensee desires to transact business in more than one customs district. However, a licensee having a license in force in one district may on application to the Committee be granted a license to transact business in [fol. 43] another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated, and is prepared and qualified to render efficient service in such other district. Licenses may be granted to partnerships with two licensed members, and to corporations and associations with two licensed officers, whether or not such members or officers are licensed in the district for which the partnership, corporation, or association license is granted."

and the rules of the United States Treasury Department made pursuant to the Tariff Act of 1930, as amended, and in force and effect during the times involved in this action, among other things provide:

> "Art. 1398 (subdivision u.) Every licensed officer or member of a corporation, association, or partnership, which is licensed as a customhouse broker shall exercise responsible supervision and control over the transaction of the customhouse business of such corporation, association, or partnership."

That plaintiff elected the defendant Jensen as alleged in its complaint, to its said offices of trust and thereupon entrusted to him the duty of responsibly supervising and [fol. 44] controlling its customhouse business within said district #34 to insure the requirements of said law and rules; and the defendant Jensen knowingly and understandingly accepted said offices subject to said rules and law, and to that end agreed to let and assign to plaintiff the exclusive use of his individual license as a customhouse broker in his said capacity of its managing agent.

II

With reference to the allegations of defendant Jensen as to plaintiff's books, the plaintiff alleges that the laws and regulations of the United States in force and effect during the times involved in this action provide:

> "Art. 1392 (e) The term 'books and papers' includes all books, accounts, records, papers, documents, and correspondence of a customhouse broker relating to his customhouse business," and
>
> Art. 1395 (b) Each licensed customhouse broker shall maintain correctly and in orderly, itemized manner, and keep current records of account reflecting all his financial transactions as a customhouse broker. He shall keep and maintain on file a copy of each entry made by him, and copies of all correspondence and other papers relating to his customs business," and
>
> [fol. 45] (g) "All of the books and papers required by the foregoing provisions of this article shall be kept on file for at least five years and maintained in such manner that they may readily be examined. Any

or all of such books and papers shall be made available to duly accredited agents of the United States on demand therefor within five years after their preparation or receipt by the broker, or within such longer period of time during which they remain in the possession of the broker. The broker shall also furnish such additional information regarding his activities as a licensed customhouse broker as such agents may require.

That on accepting said offices of the plaintiff mentioned in its complaint herein, it became and was ever the duty of the defendant Jensen while in possession of said customhouse business as plaintiff's managing agent, to obey and observe said law and rules; that plaintiff entrusted to him its aforesaid books and records on or about September 6, 1938, and since said last mentioned date the defendant Jensen has had the absolute control and the exclusive possession of the plaintiff's aforesaid books and records. That plaintiff's said books and records have not been surrendered or returned to it but are now in his possession and under his control as alleged in plaintiff's complaint. That plain-[fol. 46] tiff has not consented to, nor approved, knowingly or otherwise, of their surrender, loss or destruction nor of their deposit with any attorney or other person or in any office other than its own.

III

Except as herein explained, plaintiff denies each and every allegation of new matter in said answer contained.

Wherefore plaintiff renews its prayer for relief as prayed for in its complaint in this action.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota; Lewis L. Drill, Commerce Building, St. Paul, Minnesota, by Leonard Eriksson, Attorneys for Plaintiff.

(Reply duly verified.)

IN DISTRICT COURT OF KITTSON COUNTY

REPLY TO SEPARATE ANSWER OF DEFENDANT CURTIS M. RIME

The Plaintiff for its reply to the separate answer of defendant Curtis M. Rime, denies each and every allegation of new matter contained in said answer.

[fol. 47] Wherefore plaintiff renews its prayer for the relief prayed for in its complaint in this action.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota; Lewis L. Drill, Commerce Building, St. Paul, Minnesota, by Leonard Eriksson, Attorneys for Plaintiff.

(Reply duly verified.)

IN DISTRICT COURT OF KITTSON COUNTY

Transcript of Testimony

The above entitled action being upon the Calendar for the November, 1941, Regular Term of said Court, came on for trial before the Hon. Oscar R. Knutson, a Judge of said Court, without a jury, by consent of the parties, on the 8th day of December, 1941, at the courtroom in the Courthouse, in the Village of Hallock, in the County of Kittson and State of Minnesota.

Leonard Eriksson, Esq., and James S. Ericksson, Esq., of Fergus Falls, Minnesota, appeared as Attorneys for the plaintiff.

Francis Murphy, Esq., of Fargo, North Dakota, Robert W. Palda, Esq., of Minot, North Dakota and A. D. Barnemann, Esq., of Hallock, Minnesota, appeared as Attorneys for the defendants.

[fol. 48] The following proceedings were then had:

The Court: You may proceed.

Mr. Murphy: I assume, if Your Honor please, that this is the proper time to make an objection here that we desire entered in the record. Matter has been placed in issue in the answer and, in other words, we question the authority of this corporation, which the complaint alleges is a foreign corporation, that is, a North Dakota corporation, to sue in the Courts of Minnesota under the foreign corpora-

tion statute of this State by reason of their failure to procure a certificate of authority and we desire at this time to file with the Court the certificate of the Secretary of State, Mr. Mike Holm, showing that to be the fact that no certificate of authority has ever been issued, and I call your attention to the Minnesota Statute which provides in terms that no foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain an action in any Court of this State until such corporation shall have obtained a certificate of authority.

Mr. Eriksson: If the Court please, if there is any argument on this or any other similar point in the case James Eriksson will argue the law but I don't think that it needs any argument on that point at this time because clearly this is a corporation engaged in interstate commerce.

[fol. 49] The Court: Well, I'll be glad to hear your arguments on this if you wish to submit it.

Mr. James Eriksson: I think it may be conceded that the plaintiff corporation has not secured a certificate of authority to do business in this State. The position of the plaintiff is this, your Honor, that the statute in question does not apply to the plaintiff corporation for the reason that the plaintiff is engaged in interstate commerce and that the statute is not intended to apply to corporations such as this plaintiff. (Further argument omitted.)

The Court: Well, the question is sufficiently doubtful so that I shall reserve the ruling on it at this time and you may proceed with the evidence.

We will take a ten minute recess at this time.

(Morning recess.)

The Court: Do you wish to be heard on this matter, Mr. Murphy?

Mr. Murphy: As I understand it you have reserved your ruling?

The Court: Yes. I think the record should show, however, that you have submitted the certificate as a part of your motion and that it is received in evidence.

Mr. Murphy: I ask that the record so show.

The Court: Very well.

Mr. Eriksson: At this time we will call the defendant, Mr. Jensen, for cross-examination under the statute.

[fol. 50] NORMAN G. JENSEN, one of the defendants, called by the plaintiff for cross-examination under the statute, and being first duly sworn testified as follows:

Cross-examination under the statute.

Mr. Eriksson:

Q. Your name is Norman G. Jensen?
A. Yes.
Q. And you are one of the defendants in this case?
A. I am.
Q. You are residing at Portal, North Dakota, are you?
A. Yes.
Q. And at the present time you are interested in a business at Noyes, Minnesota, the name of which I believe is "Norman G. Jensen, Customhouse Broker"?
A. I am.
Q. That is located at Noyes, Minnesota?
A. It is.

. . . . . .

[fol. 51] Q. And then sometime in 1937 you got a license as a Customhouse Broker—can you give me the date of that license?
A. The license is dated some date in March, 1937.
Q. Have you got that license here?
A. No, I don't have it here.
Q. And you have maintained a license or had one renewed each year, have you?
A. We don't have to have it re-newed each year.
Q. Then your testimony is that that license originally obtained by you is the license that has been in force continuously since that time?
A. That's right.
Q. That license was issued by the United States Treasury Department?
A. Yes.

. . . . . .

[fol. 52] Q. And you either learned or knew when you arrived that the Union Brokerage Company had been conducting a business as a Customhouse Broker for several years at least, prior to the time of your coming?

A. Yes.

Q. Incidentally, what is the first place at which you had done any business under your license, Portal?

A. Yes.

[fol. 53] Q. At the time that you arrived to begin your own business as a Customhouse Broker, in Portal, North Dakota, the Union Brokerage Company, had its offices in Portal and it was managed by M. V. Carlson and H. O. Kramer, is that right?

A. M. V. Carlson was president of the company——

Q. Yes——

A. H. O. Kramer had some connection——

Q. Well, you knew that they were connected with it and conducting the business for the plaintiff under some authority?

A. Yes.

Q. That is what you learned at the time and knew at the time, is that right?

A. That's right.

Q. Did you then know or did you later find out that the controlling stockholders of plaintiff corporation were Mrs. Nan W. Anderson and Mrs. Annie Kramer?

A. I don't know when I found that out; I don't remember.

. . . . . .

[fol. 54] Q. The business of customhouse brokerage is a business which is engaged in or which may be engaged in only by persons having a customhouse brokers license issued by the treasury—United States Treasury Department, is that right?

A. There are some exceptions but technically speaking we can say that is true.

Q. The exceptions to which you refer are exceptions stated in the law itself, are they?

A. That's right.

Q. And they apply, for example, to a person having a Power of Attorney, that is one exception?

A. That's right.

Q. And he can have or enjoy such a Power of Attorney only on condition that the grantor of that power himself has a license?

A. Not necessarily.

Q. Well, the law will speak for itself. Now, a Customhouse Broker may be defined, may it not, to be a person, whether an individual, a partnership, an association or corporation, who, acting on behalf of others, transacts customs business not exempted or limited by the Act of Congress for the protection of importers and the revenue of [fols. 55-58] the United States in execution of the Tariff Act in force? If you want that read the reporter will read it.

(Question read, line 21 to 27, P. 19)

A. Yes.

Q. The plaintiff, within your understanding, was such a licensed broker in 1937 and 1938?

A. Yes.

Q. And you yourself were such a broker?

A. From the date that I received my license in 1937.

Q. Yes. In the case of a corporation such as the plaintiff its own license, you know, would be of no avail or benefit to it unless at least two of its officers were individually licensed?

A. It couldn't have a license unless two officers were licensed.

Q. That's right—that's a better statement than mine, and where an emergency arises for one cause or another so that there is an interruption in the number of officers individually licensed or the number of officers individually licensed is reduced below two, say to one, then there is provided a grace period—a period of grace of 60 days for the corporation to supply another individual licensee?

A. That statement is correct.

• • • • • • •

[fol. 59] Q. Before you got a license to engage in the business of a customhouse broker, may I assume that you have made some study of these laws to acquaint yourself with the rules and regulations of the treasury department?

A. You may.

Q. And that is a fact?

A. That is a fact.

Q. And since that time, that is, since you entered upon the business under that license, you have, it is true, is it not, similarly tried to acquaint yourself with the rules and

regulations of the treasury department so that you have kept pace with the rules and regulations, is that right?

A. That's right.

• • • • • • •

[fol. 60] Q. The regulations under which you have conducted your business as a licensed customhouse broker, and during all the times that we are speaking of now in this case, required you as a licensed customhouse broker to keep true and accurate records of all financial transactions had, that's right, isn't it?

A. I don't remember all of your question.

(Last Question, line 11 to 15 read to witness.)

A. I kept true and accurate records of all transactions of all customhouse brokerage that I did.

[fol. 61] Q. And the law in force during all this time, according to your own understanding and knowledge, has required you to keep such records of financial transactions for at least five years from the date of each of them, isn't that right?

A. Yes.

• • • • • • •

Q. You understand the term "intra-state"; you understand that term?

A. Intra-state? It's within Minnesota.

Q. Yes. You, as a broker, have nothing to do with shipments that originate in Minnesota?

A. Not very often.

Q. Not at all, have you?

A. We might handle some that originate in Minnesota and go into Canada.

Q. Well then, in those cases it is in relation to commerce between Canada and Minnesota as a part of the United States?

A. That's right.

Q. In other cases, as a rule, the business in which the customhouse broker deals originates, as a rule, in a foreign [fol. 62] country or in some cases originates in the United States and is transported—that is, originates in some other state than Minnesota and is transported in bond through Canada and down into the United States?

• • • • • • •

A. I can't answer that question, Mr. Eriksson, either yes or no; you have two questions in there.

. . . . . .

[fol. 63] Q. In the other class of cases the broker serves, in the capacity authorized by law, importers whose shipments originate in Canada or some other foreign country and whose shipments of merchandise into the United States enter the United States through a port of entry in the district for which you have a license?

A. May I have that read? (Last Question, Lines 20 to 24 read.)

A. The question is so long and involved that I can't keep the continuity of it in mind. Would you mind putting it in smaller questions, please.

Mr. Eriksson: Alright——

Q. A great majority of shipments of merchandise into the United States, which come into the United States through the district in which you have a license, originate in Canada?

A. I don't know whether I have your question right or not; I'll try to answer it by making this statement: The majority of a broker's business is clearing shipments from Canada or some other foreign country shipped through a [fol. 64] port at which a broker is working into the United States.

Q. Alright. And in that capacity the licensed customhouse broker serves on one hand the importer and on the other hand the United States in the matter of seeing to it that proper revenue is collected or determined?

A. That may be so; I never thought of it in that connection; I wouldn't want to deny it; I wouldn't want to confirm it.

Q. In practice that is what is behind this provision of the Statute which I read previously: (reading) "The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States". Isn't that right?

A. That's correct. It's printed right there (indicating).

Q. I mean this service that you have just explained is to carry out this provision in part, isn't it?

A. That's right.

Q. So that in as much as you have nothing to do with business moving from Noyes to Hallock or from Noyes to Minneapolis or other points in Minnesota, you are dealing, handling and examining clearances of goods that originate either in a foreign count-y or in some other state than Minnesota?

A. I can't answer that because you have two questions in there.

[fol. 65] Q. And so, to make this attempted investigation clear and simple, a customhouse broker is rendering services to both the government of the United States and the importer, isn't that right?

A. That's right.

Q. And that is all his business?

A. No, he renders service to exporters.

Q. All right; we'll add that to it—is that all of his services?

A. It is all I can think of right now.

* * * * * * *

Q. Now, this license that we have been talking about is granted to you and the plaintiff has a license for District Number 34, has it not?

A. That's right.

Q. And District Number 34 is a district of which the geographical limits—the geographical limits of which are the northern half of North Dakota and a substantial portion of the north half of Minnesota, isn't that right?

A. I don't think so.

[fols. 66-80] Q. Well, will you please tell us the geographical limits of District Number 34?

A. According to my recollection it is North and South Dakota and Kittson County, Minnesota, that may not be right but that is according to my recollection.

Q. Well, in any event, it includes Noyes with the rest of it—Noyes is in and included in District 34?

A. Noyes is in District 34.

Q. And Portal, North Dakota is in the same district?

A. Yes.

* * * * * * *

[fol. 81] Q. And going back to this business to talk about the services rendered a little bit—at Portal there is only one railroad coming to the town, isn't that right?

A. That's right.

Q. And that is the Soo in the United States?

A. Yes.

[fols. 82-83] Q. And the C. P. R. coming to the United States connecting with the Soo, isn't that right?

A. Sure.

Q. That is the only road serving Portal and over which shipments of merchandise into the United States, subject to services by the customhouse broker, could be had?

A. That's right.

Q. And in 1938, and for months afterwards, this business of importing merchandise from Canada into the United States over these roads continued to grow?

A. Yes; I went out and got more business.

[fol. 84] Q. You admitted this morning that you understood the law to be that every licensed customhouse broker would have to keep for at least five years a true and accurate financial record of his transactions.

A. That's right.

Q. And those financial transactions or records of those financial transactions would disclose in each instance the name of the exporter and the importer served by you or by a given licensed customhouse broker, isn't that right?

A. It wouldn't in every instances give the name of both; it would in every instance give the name of one or the other.

Q. Yes. Now, so that we understand your answer, let me divert enough to say this: that supposing we have a shipment of lumber from British Columbia routed over the C. P. R. to connect with the Soo at Portal, there are cases where the exporter in Canada would leave instructions with the shipment that the consignee or the importer would pay the dues, the fees, and the duty, isn't that right?

[fol. 85] A. That's right.

* * * * * * *

[fol. 86] Q. Alright—I'm showing you now a form which has been identified as Plaintiff's Exhibit D and ask you if that is not the form usually referred to and identified in the records of the Collector of Customs as Form No. 3079?

A. This is Customs Form Number 3079.

Q. And the rules and regulations of the Treasury Department required you, as a licensed Customhouse Broker and every other licensed U. S. Customhouse Broker, to

keep a true financial record on this form unless the particular broker were exempted, isn't that right?

A. That's right.

Mr. Eriksson: Now, I offer Exhibit D in evidence to show the nature of the records which the Customs Department of the United States Treasury require him and other licensed brokers to keep.

Mr. Murphy: No objection.

The Court: It may be received.

Mr. Eriksson:

Q. This form, Exhibit D, first requires the name of the broker, his address and the port of entry at which he is stationed, isn't that right?

A. That's right.

Q. And stopping for a moment—for every port of entry there is a port of exit, is that right—for Noyes, which is the port of entry, the corresponding port of exit is Emerson?

A. To the best of my knowledge your statement is correct.

[fol. 87] Q. And in the case of Portal, which is another port of entry in the United States, the port of exit is North Portal, isn't that right?

A. That's right.

Q. The next column (indicating) has reference to certain symbols that may or may not be of consequence here; I'll refer you to this second column "Symbol"——

A. That's obvious.

Q. Then the third column is "Date of Entry"; there is shown, is it not, the date on which a particular entry is made?

A. That's right.

Q. —by the Customhouse Broker?

A. If they use that particular form.

Q. If they use this form yes. The next column is described and divided into three parts and headed "Value of Merchandise"; the next one is likewise divided into four parts and is headed "Amounts Deposited With United States"; the next is "Amounts Refunded Payee by United States" and is divided into three parts; and so on down the line as shown in this schedule, isn't that right?

A. That's right.

Q. Now, the law provides and you know that to be true in practice, that a Customhouse Broker may be exempted from keeping his records in the detail and in the form prescribed or provided for in this Exhibit D, isn't that right?
[fols. 88-107] A. That's right.

Q. But in such a case the law requires—and you know that to be true in practice—that, if exempted, the licensed Customhouse Broker has to keep records equally complete?

A. The practice is that the broker who is exempted from this may keep records on any form that is o-kayed by the Special Agent.

* * * * * * *

[fol. 108] Mr. Eriksson: I now ask to have this list identified in this case.

(Plaintiff's Exhibit F marked for identification.)

Mr. Eriksson:

Q. Is that the list of shippers or clients with whom the Union Brokerage Company—whom they served as licensed Customhouse Brokers at Portal, North Dakota, while you were mangaer and which you sent in response to the demand for a list of clients and shippers served?

A. This (indicating) is three pages of such list; it may have been all of it.

Q. Well, I'm not asking you that now—if I did, pardon me; what I intended to ask you is this simple thing: is that the list which you made up and sent in response to Mr. Applebaum's request for a list of shippers and clients [fols. 109-111] served by the Union Brokerage Company?

A. I think this is a copy of that list; the original list as I made it out was attached to the front page of the general journal of the Union Brokerage Company.

Q. When you speak of a "general journal" you speak of a journal which you kept as the manager of the plaintiff?

A. As the treasurer.

Q. As the treasurer or whatever capacity you had and then that is the list which you sent, is it not?

A. It just seems to me there were four pages when I sent it but maybe it was only three.

Mr. Eriksson: Well, then we offer Exhibit F——

Mr. Murphy: Let me see it—no objection.

The Court: It may be received.

* * * * * * *

Mr. Eriksson:

[fols. 112-113] A. I can't answer that with a yes or no; I'll have to explain it——

Q. Just a minute—you don't recall them as clients?

A. I know both companies well.

Q. You know both companies well?

A. Yes.

Q. Well, did either of them do business with the Union Brokerage Company or through the Union Brokerage Company while you were its manager?

A. Not as shippers, not as importers and—or not as exporters—there might have been an error in the duty and we had to write them a letter about it—they became brokers in Seattle or places in the United States—they both have offices in Seattle and aren't listed as clients for lumber because the lumber clients are the mills, not the wholesalers or brokers; as a general rule these companies ship in their own name from the other mills; for instance, Gray Lumber & Shingle Company ships from a mill at Port Moody—I was just trying to think of the name of it but I can't—they take the entire output of that mill and we dealt with the mill but not with Gray Lumber and Shingle Company.

* * * * * * *

[fol. 114] Q. Well, we'll eliminate these two; the rest of them that you have named on this list, Exhibit F, were and had been shippers for whom the Union Brokerage Company had acted as licensed customhouse brokers, isn't that right?

A. They had been customers of Union Brokerage Company.

Q. And the two that we have singled out as not appearing on Exhibit F, in those two cases their principals had been served by the Union Brokerage Company?

A. I presume that's right.

* * * * * * *

[fol. 115] Q. In that connection, Mr. Jensen, it is true—so we understand the set-up—that these names were taken

from the ledger of the Union Brokerage Company, is that right?

A. Well, maybe from the ledger; I thought it was from the journal.

Q. Whether you call it journal or ledger—you took it from a book representing a permanent record of the Union Brokerage Company, isn't that right?

A. That's right.

. . . . . .

[fol. 116] Q. And under this system that has been prescribed by law, in the case of a shipment of merchandise into the United States on which duty is required, the broker—I am speaking of you now serving as the Union Brokerage Company—either advanced that duty and charged it to the shipper or consignee or charged it against the railroad that carried the merchandise or received the money in advance from the shipper—isn't that right?

[fol. 117] A. That's right.

Q. And because of those three situations and the law governing that kind of a business, it was your duty while managing the Union Brokerage Company to keep track of each entry?

A. Keeping track of each entry was part of the Secretary's job.

Q. But he was working under your direction as manager, isn't that right?

A. Well, it's a cinch I had to direct him.

Q. Well, of course, that may be—I'll pass that by for the present. That situation that I have just indicated by my previous question is the situation that produced the accounts from which that list, Exhibit F, was taken, isn't that right?

A. Most of these accounts were obtained either through the handling of fees or of refunds and not so much on the duty.

Q. Well, it was one or the other, isn't that right?

A. That would be right.

Q. And the reason for that is that whether you advanced the duty or it was to be collected at the destination of the shipment or advanced by the exporter, it might be an overpayment, isn't that right?

A. It might be.

Q. And in the case of an over-payment the exporter or importer, as the case may be, would have to have the [fol. 118] means by which to claim an over-payment or a refund, isn't that right?

A. We can call that correct.

Q. And in such a case the man to whom—or the agent to whom they turned was the broker who had served in making that particular entry, isn't that right?

A. If we didn't make the refund before they found out about it—if we didn't do it that way——

Q. In either case you would be the one through whom the refund would be paid?

A. That's right.

Q. And so in order to keep track of these things and be able to account for every refund—or the other way around, less duty than was actually required—you have to keep these accounts?

A. Well——

Q. Let me pause a moment—to make it a little simpler—there are cases where duty is unpaid too, isn't there?

A. Yes.

Q. And so you have to keep the account to be able to not only make claim for over-payment but also to make claims for under-payment against the shipper, isn't that right?

A. We don't do it that way.

Q. What did you do in regard to under-payments?

A. Whenever there was an underpayment, we get a notice [fol. 119] that the government had so much money coming and we go up and get the original copy of the entry and find out the shipper from the invoice on that and write him from that.

Q. Well, in any case, you had to keep track of the particular transaction, isn't that right?

A. We keep a copy of the entry.

. . . . . .

Q. Didn't you begin an account showing the amount of duty paid or remitted to be collected by the carrier and your fees?

A. We made a statement to the railroad company to that effect.

. . . . . .

Q. Now, Mr. Jensen, speaking of one part of these ac-
[fol. 120] counts and that part relating to refunds, there is a record made of every refund that is made, isn't that true?

A. Do you mean in the Union Brokerage Company or in the broker's office?

Q. Well, you did what the law required I suppose, didn't you?

A. Yes.

Q. And the law requires you to keep track of the refunds, isn't that right?

A. Oh, yes.

Q. And you did?

A. Oh, yes.

Q. In order that we may understand the situation, refund, in the first instance, is the amount or represents the amount of over-payment of the duty exacted from the importer or exporter, as the case may be, in any given instance of payment of duty, isn't that right?

A. That's right.

Q. And the word "refund" may not only include the difference between the proper amount of duty to be paid on a given shipment but also the liquidated damages suffered by the importer or exporter, as the case may be, for failure on the part of either the collector of customs or the broker to do something that the law requires, isn't that right?

A. I don't quite understand you there.

(Question Line 16 to 21 above read to witness.)

* * * * * * *

[fol. 121] Q. You may.

A. A refund is the re-payment by the government to the broker of excessive duties collected by the broker and paid to the government.

Q. Now, the next part of my former question is this: in addition to refund—in addition the refund may include, at times, liquidated damages, may it not?

A. You mean liquidated damages refunded by the government?

Q. Yes.

A. It may.

Q. Now, in order to be sure that the broker, customhouse broker, shall not lose his license, but assist the government

in serving its importers and protecting the revenue of the United States, it is necessary, is it not, in practice, to keep at all times an accurate account between the broker, on the one hand, and the shipper served, on the other?

[fol. 122] A. Yes, we keep accurate accounts.

Q. And it is—and the list, Exhibit F, is a sum total of the business done with shippers by the Union Brokerage Company so far as the number of clients are concerned at the time you made the list, isn't that right?

A. To the best of my knowledge that list includes all the shippers, all the clients.

Q. And in that same connection, speaking still of refunds, it is true, is it not, that these refunds may come up weeks, months and years after the duty has been paid?

A. Yes.

Q. Similarly, it is true, is it not, that underpayment of duty may be claimed against an exporter or importer, through the broker, weeks, months and years after the duty has been paid?

A. It may.

Q. And so, all these things that I have mentioned now combine to make it necessary to keep these accounts, isn't that right?

A. Those last two aren't so necessary for the accounts.

Mr. Eriksson: I see. I think this (indicating) is a pile consisting of 70 pieces of papers in writing or printing and I will ask to have it all identified as one exhibit, with the understanding, if we may, that when time permits, we will make an accurate count of the pieces of paper and arrange them according to dates.

The Court: You may offer them in that way if there is no objection——

[fol. 123] Mr. Eriksson: I'll ask to have them identified with that reservation that we arrange them according to dates and actually count the pieces of paper afterwards, if that is al- right?

Mr. Palda: Sure, that's al- right.

(Plaintiff's Exhibit G marked for identification.)

Mr. Eriksson:

Q. Mr. Jensen, will you kindly examine this bundle of documents of various dates but all assembled as Plaintiff's

Exhibit G and, after having examined them, state if it is true or not that all of them represent records of refunds—and, may I add to the question, that if you find any that do not represent a refund item that you take that out so that that particular document may be discarded as a part of that exhibit.

(Plaintiff's Exhibit H marked for identification.)

A. These (indicating Exhibit G) all appear to be notices of refund that come along with refund checks and work sheets attached to some of them.

Mr. Eriksson: Subject to the reservation first mentioned, namely, that after we recess we arrange them according to date and count them accurately, we offer Exhibit G as a part of the cross examination.

Mr. Murphy: You say these are statements of refund accounts and remittances together with work sheets con- [fols. 124-136] nected with them in some instances but not all the refunds but some of them——

Mr. Eriksson: Well, all that we have offered are——

Mr. Murphy: Well, I don't want to object to any exhibits; I'm trying to get in my head what the materiality of it is but possibly it will be developed later——

Mr. Eriksson: I'm sure it will be——

Mr. Murphy: I have no objection to the exhibit as such.

* * * * * * *

[fol. 137] Q. Well, my question was, at the time that you left or resigned there were pending claims or protests in the Customs Court of the United States handled by New York attorneys, isn't that right, and those claims were live claims?

A. That's right.

Q. They were claims that had arisen or that existed because of business done under your administration, isn't that right?

A. That's right.

Q. And those protests and those claims had not been determined?

A. That's right.

* * * * * * *

[fols. 138-147] A. I don't know.

Q. You don't know—on that point, for the present, it is enough. I'll revert to it later. Now, Mr. Jensen, when you

had gotten into the company and assumed its management you found that the business of the Union Brokerage Company had been and was a prosperous and profitable business, didn't you?

A. It wasn't a bad business.

* * * * * * *

[fol. 148] Q. That is all you had when you came to Portal?

A. Yes.

Q. Now, you found out from your own individual practice as a customhouse broker and from your services and office in the plaintiff's business that the prosperity of a customhouse broker's business depended on, in the first instance on the carrier—rail carrier—shipping merchandise into the United States through the port of entry where you were located, isn't that right?

A. That's right.

Q. In your case, at Portal, there was only one road coming in?

A. One railroad.

Q. And in addition to that there was some highway importations, isn't that right?

A. Yes.

Q. But the highway importations, which were subject to clearance, were comparatively small when compared with the shipments coming over the common carrier—the Soo or the C. P. R.?

A. That's right.

[fol. 149] Q. Probably representing only about ten per cent or less, is that right?

A. I couldn't say—oh, I'd say less than ten per cent.

Q. Five per cent?

A. Well, probably.

Q. And so long as the C. P. R., connecting with the Soo, carried shipments of merchandise into the United States, the business of the customhouse broker there had a chance to be successful, isn't that right?

A. That's right.

Q. And especially so after the two of you merged into the plaintiff corporation, isn't that right?

A. Yes, we were quite successful.

Q. Of course, where there is more than one road at a port of entry, there may be more competition, isn't that right?

A. Oh, there may be.

Q. Now, the shipments of merchandise into the United States virtually stopped through Portal on July 1, 1940, isn't that right?

A. Somewhere in July, 1940.

Q. Now, in that connection—it might to some extent be repetition but pardon me—the license that you had as an individual customhouse broker became used as a part of the bargain by the plaintiff to satisfy the requirements of the law that two of the officers, at least, should be individually licensed, isn't that right?

[fol. 150] A. I became one of the two licensed officers.

Q. And your license, your individual license as a customhouse broker was the same kind of a license which the plaintiff had?

A. Oh, yes.

Q. And both licenses or any license issued for that district covered the same territory, isn't that right?

A. That's right.

Q. Yours covering District 34 and the plaintiff's covered District 34?

A. Yes.

Q. Now, Mr. Jensen, when this change occurred in routing of shipments of merchandise, the good will of the corporation customhouse broker became completely wiped out unless the corporation was able to follow the changed flow of commerce, isn't that right?

A. I presume you can put it that way.

Q. And the customhouse broker, whether it was you or the plaintiff company, could, without getting any additional license, move to or with the flow of commerce if the new routing continued to come into the United States through the District for which the license was granted, isn't that right?

A. Oh, yes.

Q. And Noyes is in that district?

A. Noyes is in District 34.

Q. You understood that all the time?

A. I always knew Noyes was in District 34.

[fol. 151] Q. And when this change in routing of shipments of merchandise into the United States from Canada or through Canada took place, that change affected about

ninety per cent or ninety-five per cent of the merchandise shipments that had come into Portal?

A. It affected a large percentage—maybe 90 or 95 per cent.

Q. That change affected the importations and exportations of merchandise into the United States carried on and done by the men and importers listed on Exhibit F, isn't that right?

A. It affected the importations into the United States from Canada.

Q. It affected these people on Exhibit F, isn't that right?

A. Most of them; some of them are United States firms.

Q. Now, isn't it true, Mr. Jensen, that any importations or exportations made by these men or firms on Exhibit F were affected by this re-routing?

A. Any importations from Canada were affected but not the exportations from the United States into Canada.

Q. Then whenever any of these firms that had been the business clientele of the plaintiff, as you have testified, required the exportation by them into the United States of merchandise, that exportation or importation by them was [fol. 152] affected by this re-routing of shipments of merchandise into the United States, isn't that right?

A. The importations into the United States from Canada would be affected.

Q. And that applies to everyone listed in Exhibit F, isn't that right?

A. If they shipped from Canada.

Q. Yes, and why did you say now, Mr. Jensen, that if shipments were made by them in the nature of exports from the United States into Canada that the result was different from what you testified yesterday?

A. I don't remember what I testified yesterday but the result is this, if they shipped from the United States into Canada they can still ship via Portal but if they shipped from Canada into the United States they don't get so much opportunity to ship via Portal—

Q. Now, accepting that for the present, that is an infinitesimal percentage of the business done by shippers and firms shown by Exhibit F?

A. As far as the brokers are concerned, it is, yes.

Q. And so, the great percentage of business done by brokers at Portal was transferred by this act of re-routing mer-

chandise shipments into the United States through Noyes, isn't that right?

A. Through Noyes or other points east.

. . . . . .

[fol. 153] Q. I am talking about District 34——

A. But they could ship the shipments through Niagara and not come through District 34 at all; they did in some cases.

Q. We'll make it specific—the 95 percent or more of shipments that used to go through Portal, whether shipped by these people or other people, became, by reason of this change in routing, shipped into the United States through Noyes, isn't that right?

A. The great majority of them came through Noyes.

Q. And so you agree that when this rerouting of shipments of merchandise or routing of shipments virtually ceased at Portal and was transferred to Noyes, Minnesota, that the corporation license permitted it to do business at Noyes or serve its clients there at Noyes the same as it had or could have been done at Portal, isn't that right?

A. The corporation license was valid in Noyes.

[fols. 154-156] Q. Then please answer my question?

(Question, line 5 to 10 above read to witness.)

A. That's right.

. . . . . .

[fols. 157-166] Q. And as a matter of fact you did set up an office in Noyes?

A. I did set up an office in Noyes.

Q. And at the time you set it up you were the manager, the actual manager and the president and treasurer and director of the plaintiff corporation, isn't that right?

A. I was.

Q. And in setting up that office at Noyes you used the same license which as an officer and manager you used to fill the requirements on the plaintiff by the laws governing licensed customhouse brokers?

A. Yes, I used my individual license.

Q. And that individual license had been committed to the business of the plaintiff by reason of the arrangement and bargain made on September 6, 1938?

A. That license was to be used as one of the two licenses to enable the Union Brokerage Company to maintain its license to Portal.

Q. Or anywhere else in the district?—in district 34 of which Noyes is a part?

A. Yes.

* * * * * * *

[fols. 167-168] Mr. Eriksson: We offer Exhibit N in evidence.

Mr. Murphy: No objection.

The Court: It may be received.

* * * * * * *

[fol. 169] Q. Then what did you mean by saying to Mr. Clark, (reading "—and his assistant informs me that they will see that the C.P.R. Agent at Emerson will detach the bills of lading and invoices from the waybills on the merchandise sent to me to be cleared"?

A. Just that the agent of the C.P.R. would give to me or to Mr. Rime the bills of lading and the invoices on merchandise consigned to us to be cleared so that we could make the entry; in other words, we would get the bill of lading and the invoice from the Canadian railroad company.

Q. At Emerson?

[fol. 170] A. At Emerson.

Q. Now, in practice that would be an entirely irregular way to handle that business, wouldn't it?

A. I don't think so.

Q. The usual and the regular and the legal way for handling merchandise shipped into the United States is this, is it not, the shipper in Canada attaches to the car an instrument called the "waybill", and in addition attaches bills of lading which designate the broker in the United States who they entrust with the handling of that shipment, isn't that right?

A. They do that——

Q. And that bill of lading consigns the shipment to the custom broker at the port of entry?

A. That's right.

Q. And when the car comes to the port of entry, after having been released at the port of exit, those bills of lading are detached by the railroad agent at the port of

entry and separated into piles showing in one pile the bills of lading consigning the shipments for brokerage purposes to Mackay, or to any other agent at the port of entry, isn't that right?

A. That's the way they do it at Noyes now.

Q. That's the way they do it unless they invent some irregular method, isn't that right?

A. I don't know.

Q. You, in pursuance of this arrangement to get the business of the Union Brokerage Company shipped by these [fol. 171] shippers on Exhibit F, went over to Canada and made a deal with Mr. Spear, handed him a stamp, and arranged with him to change the bills of lading on every shipment addressed to the Union Brokerage Company and substituted your name for its, isn't that right?

A. That's wrong.

Q. You mean to say you didn't do that?

A. I didn't make any deal with Mr. Spear to alter any bills of lading.

Q. If not with Mr. Spear with some other agent, Mr. Murphy?

A. I never made any deals to alter any bills of lading.

Q. Did you testify at the time we took the deposition that you had left a stamp with Mr. Murphy and that you had made arrangements with him that by the consent of the shippers of bills of lading should be changed?

A. I did that by the consent of the shippers.

Q. But you never did it with Mr. Murphy, did you?

A. I never talked to Mr. Murphy or Mr. Spear until after I had come back from the west coast.

Q. And that is what you had reference to when you say in this letter: (reading) "I talked to Mr. Plow this afternoon and his assistant informs me that they will see that the C.P.R. agent at Emerson will detach the bills of lading and invoices from the waybills on the merchandise sent [fols. 172-187] to me to be cleared."?

A. I mean by that Mr. Plow had informed me that we would continue the practice as we did at Portal that the C.P.R. agent would detach the bill of lading and the invoice and give it to the broker, or to me in this particular case, at Emerson.

[fols. 188-223] Q. And, in any event, before you left his office you wrote these words: (reading) "Kindly deliver to Mr. Curtis Rime all bills of lading and invoices for ship-

ments to be cleared through customs by Norman G. Jensen or Union Brokerage Company"?

A. That's right.

. . . . . .

[fol. 224] Q. Well, so we understand the subject and make it as brief as possible, one of those daily clearance sheets shows the shipments that have been cleared by you or by the customhouse broker and it shows the fees charged and collected or the fee charged and sent to the carrier to be collected or carried on the books of the company as credit extended, isn't that right?

A. The clearance sheet shows the car number, the amount of duty advanced against the car, if any, and the amount of fee advanced against the car, if any.

Q. And what has been received, as indicated, or what has been paid and settled for either by cash collected on the day covered or by credit extended on account of the company is shown by O. K.?

A. That's right.

. . . . . .

[fol. 225] Q. Well, it's a key, is it not, because by using that clearance sheet, daily clearance sheet, showing the cars cleared O. K. as to accounts that have been charged or already paid, the amount of fees left to be collected and remitted by the carrier, if they are lost or if the books and ledgers and journals are lost then the customhouse broker can use that sheet and use those figures it contains and go to the Collector of Customs or the carrier and find out what was for a given day, isn't that right?

A. Yes, I think he could check back from that both with the Collector and the carrier.

Q. Of course, if the books such as ledgers and journals are available that makes it very much more expeditious, doesn't it, to find out what customers owe money, what customer has paid the fees, and how much the railroad owes, isn't that right?

A. Yes, I think we could say that's right.

Q. So the advantage of having a journal and the ledger consists in that the broker has from his daily work an assembled sum total of the day's work in the ledger and the journal?

A. Yes. There in the Union Brokerage Company we used another step between the clearance sheet and the ledger and journal which we call a day book.

[fol. 226] Q. Then, if you had all three you'd have an easy way to find how much money had been taken in, how much money was coming and how much money the railroad owed, isn't that right?

A. That's right.

Q. And if they are gone then you can use these daily sheets and by a lengthy laborious process reestablish the charges that would appear in assembled form in the books, isn't that right?

A. Well, I guess you could work it out but it would be lengthy and laborious.

* * * * * * *

[fol. 227] Q. Mr Jensen—I am just going to use one of these daily clearance sheets taken out of the file identified as Plaintiff's Exhibit Z and will then restore it. I have wihtdrawn one sheet from Exhibit Z and that sheet bears date of September 21, 1940, and I have withdrawn from Exhibit Y another sheet, with papers attached, dated October 4, 1939. This first sheet, namely the one dated September 21, 1940, contains two—is it two—clearances made on that date?

A. It contains two—the entry for two carloads of White Spruce lumber.

Q. And the sheet, with the work sheet attached, dated [fol. 228] October 4, 1939, taken from Exhibit Y, is another so-called clearance sheet that contains a considerable number of shipments cleared, isn't that right?

A. That's right.

* * * * * * *

Q. And speaking of the sheet dated September 21, 1940, taken from Exhibit Z, is there any indication of the amount of fees collected there?

A. No.

Q. But the sheet dated October 4, 1939, contains a number of fee advances, isn't that right?

A. Yes.

Q. I mean entries—and where the fee charged through the customer or client is paid or charged for collection—

where the fee is charged against the carrier to be collected by the carrier or paid by the carrier, there the fee is indicated, is it not?

A. That's right.

Q. But where the fee is not to be collected by the carrier the mark "OK" is made?

A. That's right.

[fol. 229] Q. And that "OK" means either that the amount of the fee has been received by you or charged on the books of the company against the shipper served?

A. That's right.

Q. And speaking of the one dated September 21, 1940, no fee having been indicated at all, it means either that whatever fee you earned for clearing these two shipments was either or had either been paid in cash on the day the clearances were made or put down in the books as credit extended, isn't that right?

A. This isn't complete——

Q. Wait a minute, identify it please, by date, so that we don't get mixed up——

A. The one that you have here, September 21, 1940, is not complete as is this record on October 4, 1939. If I were to remove this back sheet from the one on October 4, 1939, that would then show no more fees than this one does; there's a clearance sheet that corresponds with this copy of the entry.

Q. Well, you may examine Exhibit Z and help us reconstruct the complete record attempted to be shown by the one dated September 21, 1940, and will you attach whatever you have now withdrawn from the file to the sheet I had withdrawn.

A. I have attached hereto (indicating) the invoices covering the two cars of lumber shown on the entry dated September 21, and I have attached thereto also the clearance [fol. 230] sheet for September 21.

Q. So that now as you have reconstructed it, as a help to me and to the Court, it is now complete for that date?

A. It's complete for that date.

Q. And there (indicating) we find the marks "OK" for each one of those shipments?

A. Yes.

Q. And that, of course, is an indication that the fee charged for the service in clearing these two shipments

was either paid in cash or entered on the books of the company?

A. In this particular case it was entered on the books of the company.

Q. And that kind of a daily practice was pursued from the time you began to act as manager until you quit?

A. You mean to keep this copy of the clearance sheet?

Q. Yes.

A. No, I don't believe we started that as soon as I came into the company but shortly thereafter.

Q. Well, of course, I'm not so particular about the form of the sheets; I'm more particularly interested about finding out whether or not this method of indicating money to be collected for the broker by the carrier or indicating money that had been either collected in cash or settled by an account, had been maintained?

[fols. 231-232] A. Oh, yes.

Q. So that throughout your service as manager that feature of the business was the same?

A. Yes, it wasn't quite as complete as you have it there because the original of that clearance sheet is turned into the carrier and at the beginning of the time I came in there they didn't keep the original and before I conceived the idea of keeping a copy of the original Mr. Kramer just didn't do it. Mr. Kramer, by the way, generally made those clearance sheets.

Q. But they were made under your direction?

A. No, that was his job.

Q. But he was working under your direction?

A. You may put it that way if you wish; he was Secretary of the company, one of the managing officers.

Q. The same kind of business was conducted down to the last day that you were there, isn't that right?

A. That's right.

. . . . . .

[fol. 233] Q. In the case of refunds, which we talked about this morning or yesterday, to illustrate in part at least what I am trying in my humble way to present, I'll call your attention to the refund item dated December 6, 1939, and ask you if it isn't true that that settlement was made on that date for refunds accruing on a shipment made in 1932 or cleared in 1932?

A. That's right.

Q. Now, protests we have already talked about to some [fols. 234-235] extent, and they are made in the Customs Court by attorneys who specialize in that business, isn't that right?

A. Yes, or the broker may handle it in Court himself if he so desires.

. . . . . .

[fols. 236-256] Q. Now, it's true, is it not, that on November 5, 1940, every dollar had been taken out of all the accounts of the Union Brokerage Company, isn't that right?

A. I think that's right.

Q. And the man who had taken it out is yourself?

A. Yes, I wrote all the checks.

. . . . . .

[fol. 257] Q. Did I understand you correctly to testify yesterday that bonds were given to secure the proper performance of duty by the Union Brokerage Company as a licensed customhouse broker?

A. The Union Brokerage Company had to file, with the Collector of Customs, Term Consumption and Immediate Delivery entry bonds, if that answers your question.

Q. Yes, and did that relieve you as an individual licensed customhouse broker of furnishing a bond?

A. Yes, it did.

Q. So you were using—you were possessed of an individual license and used it because of the bonds that the Union Brokerage Company had delivered, is that right?

A. I don't understand that question.

Q. Well, because you were an officer of the company and had an individual license as a customhouse broker, you operated as the officer of the licensed customhouse broker.

A. (No answer.)

Q. I don't know if I make it clear. You have just made it clear to us, if I understand you correctly, that although you were an individually licensed customhouse broker, you, yourself, did not have to furnish a bond to the government because you were the officer of the licensed corporation customhouse broker?

A. No. It wasn't because I am an officer of a licensed [fol. 258] corporation broker but because the entries were

made in the name of the corporation and not in the name of any individual. The bond has to be filed to the government protecting the government from the acts of importers of record whose name was on the entry; when the Union Brokerage Company made entries they made them not in the name of any particular officer; therefore, whether an officer was licensed or not, he could make entries in the name of the Union Brokerage Company on the Union Brokerage Company bond.

. . . . . .

[fol. 259] Q. What became of that bond on November 5, 1940?

A. I didn't look for it on November 5, 1940. I suppose it was still in the safe. When the bond was renewed I filed it in the safe and that's the last I can remember of it.

(Plaintiff's Exhibit DD marked for identification.)

Mr. Eriksson: I have here certified copies of the bonds of the plaintiff and offer them in evidence.

Mr. Murphy: No objection. I can't see the materiality but——

The Court: It may be received.

. . . . . .

[fol. 260] Q. And where are these bonds filed?

A. With the Collector of Customs at the port of entry at which the broker is working or at which the entry is to be made.

Q. Where the entry is to be made?

A. Yes.

. . . . . .

[fols. 261-262] Q. And what use did you make of those individual bonds that you just talked about?

A. Used them for the purpose of making entry.

Q. For yourself?

A. For myself and as a customhouse broker. You see, I had occasional seed importations for myself through Portal. They required that we have single entry bonds for seed. That was the regulation at one time. We couldn't use the term bond on seed so we had to make single entry bonds and then I'd write out the bond in my own name and make the

entry in my own name at Northgate where I conducted a customhouse brokerage business.

. . . . . .

[fol. 263] Q. Then, did you say yesterday, or did I understand you correctly, that you have not made use and secured the consignment of shipments made by exporters or importers to the Union Brokerage Company as broker-consignee?

. . . . . .

A. I have to answer by more than yes or no. Whenever we have received those bills of lading consigned to the Union Brokerage Company my instructions to Mr. Rime were to take them back to the Canadian car... and ask to have them ascertain which of the brokers working at Noyes was to clear them and to get them for us if possible.

Q. Passing up the significance of that answer, which I'll [fols. 264-267] call attention to later, the fact is that you have cleared, at Noyes shipments consigned to the Union Brokerage Company, isn't that right?

A. I have heard that we have; I don't know.

Q. You have heard it?

A. Yes. I haven't made any entries on bills of lading consigned to the Union Brokerage Company.

(Plaintiff's Exhibits EE and FF marked for identification.)

Q. Your answer makes it necessary at this point to stop and talk a little bit about Mr. Rime. Mr. Rime is your authorized agent or employee?

A. Yes.

Q. And he clears shipments of merchandise from Canada into the United States through the Port of Noyes?

A. Yes, he makes entries in my name for me.

Q. And he does that under a power of attorney granted by you?

A. That's right.

Q. And that power of attorney was granted before July 1, 1940?

A. Yes.

. . . . . .

[fols. 268-271] Q. And since he got this power of attorney filled out and granted to him in the form required by law he has been your agent at Noyes?

A. He has been my agent at Noyes.

Q. And acting with the same powers as you could have acted with yourself?

A. That's right.

Q. So that you have, during all of this time, acted through him?

A. That's right.

* * * * * * *

[fol. 272] Q. Well, so I understand the term "Consumption Entry," it is one designation of certain kinds of entries and then there's some others but in usual parlance the paper is referred to as "Custom Entry," isn't that right?

A. Or just plain "entry."

Q. Now, in each of these cases, or in any other case, there is a bill of lading attached, is there not?

[fol. 273] A. Yes.

Q. And that bill of lading is filed with the Collector of Customs?

A. It is filed with the Collector of Customs with the original copy and two carbons of the entry.

Q. And you haven't kept the bills of lading that went with each of these cars, have you?

A. We have to file those with the entry with the Collector of Customs.

Q. Now, you know that you did enter these cars, didn't you?

A. We did enter those two cars.

* * * * * * *

Q. And it is true, is it not, based upon your own familiarity and knowledge of the laws and rules and regulations, [fol. 274] that without filing such a bond no person, whether licensed as a customhouse broker or not, has any right to handle or monkey with any shipments of merchandise consigned to another; isn't that right?

* * * * * * *

Q. Well, I'm not going to argue the point. I'll make it simpler if I can. We will assume that you operate and do business in Noyes, Minnesota. You understand that?

A. Oh yes.

Q. And we will assume that you operate the business of a duly licensed customhouse broker at Noyes, Minnesota.

A. Yes.

Q. In order for you to handle any shipments of merchandise coming into the United States through the port of Noyes you will have to file a bond, isn't that right?

A. It is generally accepted that we have to file a bond.

Q. Well, that is the rule and the regulation, isn't it?

[fol. 275] A. The Collector may waive it if he wants to but he hasn't waived it.

Q. You say the Collector may waive it.. In such a case an agent having a power of attorney from you could likewise, depending and relying and resting on your own bond, could handle merchandise?

A. Yes.

Q. But in neither case do the laws or regulations permit you under those conditions to take charge of bills of lading consigned to some other broker, isn't that right?

A. That's the way I understand it.

Q. Now, in this case at Noyes, Minnesota, you testified a little while ago, did you not, that the bills of lading were taken from the agent at Noyes and you brought them back to Emerson to be changed, isn't that right?

A. We brought them back to Emerson to have the agent at Emerson ascertain the broker when the broker mentioned on there was not operating at Noyes.

Q. And you claim that it is your intention to present to this Court now that the agent at Emerson would have any such authority to decide which one of you two or three or four at Noyes should handle a shipment?

A. He can ascertain from the shipper who was to handle it.

Q. And taking it away from the one to whom it was consigned?

[fol. 276] A. If the shippers instructions are to change it he may change it as the shipper instructs.

Q. And still you contend that without a bond having been first filed in a case of that kind to cover cases of that kind that you or your agent would have the right to do so?

A. I don't know what you are referring to as "the right to do so" in this case.

Q. Well, would you have a right to take the bills of lading consigned, to make it specific, to the Union Brokerage Com-

pany and go over to Emerson and say, "Fix these up in any way that suits you and then give them back to me". Did you have a right to do anything like that?

A. I think the proper place to take the bills of lading if they are not properly filled out or marked is back to the incoming carrier.

Q. That's your answer?

A. That's my answer.

. . . . . .

[fol. 277] Q. Then there is a bill of lading in duplicate, isn't there?

A. There is a customs bill of lading. It may be in duplicate or it may be only one copy.

Q. And one is for the—or something of that nature—is for the officers or the officials at Emerson, isn't it, the port of exit?

A. I don't remember of them getting a copy of the bill of lading. They might.

Q. What do they take off to show that this car is ready to go on into Minnesota?

A. I call it an export entry.

Q. That is detached?

A. Yes.

Q. But when they have detached that then the bill of lading still sticks to the car or is attached to the car showing the destination and the person to whom it is shipped in Minnesota, isn't that right?

A. The bill of lading may show that.

Q. And in addition to that what is attached to it?

A. There may be an invoice.

Q. There is usually, is there not?

[fol. 278] A. Oh, I wouldn't say usually; about half and half I believe.

Q. But in any event if there is no invoice the broker makes an invoice?

A. The shipper has sent the invoice by mail to the broker most generally.

Q. And that is in duplicate or triplicate?

A. Generally in duplicate.

Q. And then when the car comes into the station at the port of entry the station agent detaches the bill of lading?

A. He does at the present time.

. . . . . .

Q. Well now, talking about the usual practice at Noyes, the bills of lading are attached to this car when it came in [fol. 279] and an invoice was either attached or sent to the broker?

A. Well, we can say that is true.

* * * * * * *

Q. Now then, when the car, this car, came to Noyes, Minnesota, on the date shown by the exhibit, the bill of lading was detached from that car by the station agent, isn't that right?

A. I think it was at that time.

Q. And the invoice was either detached or already received by the broker, isn't that right?

A. If the invoice was with the bill of lading it was detached by the agent of the C. P. R. and given with the bill of lading to the broker.

Q. And if that consignment is to the Union Brokerage Company then it follows that whoever took charge of that shipment or assumed control over it would have to take that bill of lading and go somewhere and get it changed?

A. It was so consigned——

Q. Is it right? Yes or no?

A. Not necessarily. If the Union Brokerage Company received it then it was consigned to them. They wouldn't have to take it back.

Q. You had no right to do it nor your agent without a [fol. 280] change, did you, so long as there was no bond filed?

A. We couldn't make the entry if it was consigned to the Union Brokerage Company.

* * * * * * *

Q. Now, just one step farther in this connection, the invoice is taken by you, or whoever acts as broker, to the Collector of Customs?

A. Along with other papers.

Q. And there the broker either stamps or writes something on the invoice which is left with the Collector of Customs to indicate that that particular shipment is sponsored or responsibility assumed for it by the broker producing the invoice, isn't that right?

A. Your question is hard to answer because it isn't clear

to me at all in relation to the procedure as I understand it in customs work.

. . . . . .

[fol. 281] Q. Well, just a minute. And there the one copy of the invoice is left for the Collector of Customs, isn't that right?

A. We say "Customs" and leave off the "Collector of Customs" and then we can say it's right.

Q. Alright, I'll follow your technical use of language. We leave it with the Customs and on that invoice you either stamp your name as the broker or leave some other evidence in writing, or otherwise, to show that you are the broker for that shipment, isn't that right?

A. That would be right.

Q. And when that is done then the Customs sends its inspector to inspect the shipment to see if the shipment actually conforms to the invoice, isn't that right?

A. That's right.

Q. And the moment the inspector has done that the shipment is cleared or the carrier is permitted to proceed with the car or shipment, isn't that right?

A. As far as the Customs is concerned.

Q. So far as the Customs is concerned that shipment is then cleared or may proceed isn't that right?

A. That's right.

Q. And then the broker does his work after that?

[fol. 282] A. That is the procedure at Noyes.

Q. And in that way the broker serves to expedite the flow of commerce, interstate or foreign commerce, isn't that right?

A. The broker allows or assists in the movement of the shipments. I wouldn't know whether it was interstate or foreign commerce. It makes no difference; the shipment moves, anyway.

Q. And without such service and without these steps that I have so imperfectly described it would impede or delay and increase the expense of handling these importations and exportations, isn't that right?

A. I presume it would. I never went into that.

Q. In other words, after you have gotten the records at the Customs office in such shape that the inspector has the right to go and inspect the shipment; your work in com-

pleting the entry may take minutes, it may take hours, isn't that right?

A. Oh yes, it takes time.

Q. It takes time and in the meantime this shipment may be on its way many, many miles by the time you get through?

A. Yes. We have 48 hours in which to make an entry.

* * * * * * * *

[fols. 283-284] A. Oh yes. You left out one step in clearing the shipment——

Q. Well, I wouldn't be a bit surprised if I left out two because I'm not a customhouse broker.

A. The one clearance sheet goes to the carrier in addition to the clearance sheet to the Customs before the shipment may move. I just wanted to have that in.

Q. Is that delivered by the Customs Inspector or by the broker?

A. By the broker. There is a copy of the clearance sheet delivered to the carrier and there is a copy of the clearance sheet delivered to the Customs.

Q. That is the same thing we discussed last night on which is shown the amount due the carrier—I mean the amount of duty that the carrier is to collect as well as the amount of fee he is to collect for the broker?

A. That's right.

* * * * * * * *

[fols. 285-301] Q. In other words, you had, by October 1, 1940, through your campaign on these various trips that you have referred to, gotten these people to turn the business over to you at Noyes who formerly did business with the Union Brokerage Company?

A. I received business from clients who formerly did business with the Union Brokerage Company.

* * * * * * * *

[fol. 302] NORMAN G. JENSEN, recalled for further cross examination under the statute.

* * * * * * * *

A. I can make this statement: there were some shipments that arrived at Noyes consigned to the Union Brokerage Company.

. . . . . .

[fols. 303-304] Q. Now then, the next question has already been answered practically but if you wish to add anything to it, do so. The practice employed was to take such bills of lading and invoices from the carrier at Noyes, bring them to the C. P. R. officials at Emerson and there get them changed over to you individually?

A. It is correct down to "and there", which should be: and there have them ascertain the proper broker.

Q. And this was done because you claim it to have been true, or to be true, that the C. P. R. had the right to redetermine for the shipper which of the brokers at Noyes should handle shipments consigned to plaintiff as broker since plaintiff had no office at Noyes?

A. The incoming carrier may ascertain the proper broker when the shipment comes with no broker designated or a broker designated which is not operating at that port.

Q. And that was your theory for doing that?

A. Yes.

. . . . . .

[fol. 305] Q. At that time you were drawing your regular salary as President of the plaintiff?

A. I was.

Q. And to effect this change in the consignments, that you have described, you had to represent, and you did represent, to the C. P. R. officials and the shippers consigning shipments to the plaintiff, that the plaintiff was not doing business at Noyes?

A. Read the question please.

(Question, Line- 6 to 10 above, read to witness.)

A. That's right. The plaintiff was not doing business at Noyes.

Q. And that despite the fact that you were in Noyes as its paid manager?

A. I wasn't in Noyes very much.

Q. Whenever you were there you were paid as its manager, were you not?

A. I received a monthly salary from the Union Brokerage Company.

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[fol. 306] Q. I call your attention to Exhibit MM and I ask you to state if that is not a carbon copy of a letter written by you after July 1, 1940, regarding the plaintiff's business?

A. Yes, I wrote the original of this letter.

Mr. Eriksson: We offer Plaintiff's Exhibit MM in evidence.

Mr. Murphy: No objection.

Mr. Eriksson:

Q. Now, this letter is taken from the file which you examined this forenoon, isn't it?

A. It is a copy of a letter addressed to E. A. Towns. I didn't notice whether it was in there this forenoon or not.

[fols. 307-309] Q. Didn't you read it then?

A. No.

Q. And in this letter you say to these people, (reading) "I notice that I have not received the check for $28.00 covering the June account. It may be that this was sent to Noyes. I will appreciate an early reply as I am closing the affairs of this company—under my supervision".

A. I meant just exactly what I say there: I am closing the affairs of this company under my supervision. My supervision would end within the next ten days after that letter was written.

• • • • • • •

[fols. 310-331] Q. At the end of September, 1940, you had set up a liability in your favor of $512.78, isn't that right?

A. That's right.

Q. And during that month you had received salary in the sum of $275.00?

A. No, $250.00; you want to remember that $25.00 of that goes to Applebaum.

Q. Well, probably; did you send $25.00 to Applebaum in September?

A. I'll see. No, it was carried on the books right there, (indicating) $24.75.

Q. All right, $24.75, and that is included in that salaries of $275.00?

A. That's right.

Q. So that you got $250.00. And then travel in September $168.12?

A. That's right.

. . . . . .

[fols. 332-337] Q. And then it is true here, as it was before when you testified in regard to the Portal business, that the bills of lading which these items represent are left with the Collector of Customs or at the Customs office?

A. Yes, in the Customs office.

Q. And the duplicate is sent on with the car when the car is released by the station agent or by the customs?

A. If there is a duplicate we retain that.

. . . . . .

[fol. 338] Q. Now then, will you please refer to your [fols. 339-351] ledger and journal and tell us how much fees were taken in for July, August, September, October and November, 1940, which, I suppose, or at least my question assumes, will be based on similar records.

A. The total amount of fees collected in July, 1940, $944.67—collected or charged that is——

Q. Collected or charged?

A. Yes. For August, $1377.75; for September, $756.80; October and November appear to have been combined in here, $2800——

Q. How much?

A. $2860.00——

Q. Now, give the rest for December to the present time.

A. December, $929.05; January, $895.00; February, $627.10; March, $587.50; April, $574.00; May, $968.50; June, $1043.50.

[fol. 352] Q. And the brief survey that has been made in this examination of the work together with the experiences that you know about makes the business of customhouse brokers a very technical business?

A. It's technical.

Q. A broker has to understand the laws and regulations in order to properly serve the importers and the government, isn't that right?

A. Yes, he has to know the things pertaining to the business.

Q. Now, you selected Mr. Rime with only five days' experience?

A. Five days' practice.

Q. And where were those five days' practice?

A. Over at Portal.

Q. Under your direction?

A. Under my direction.

Q. And neither Mrs. Anderson or Mrs. Kramer knew that his work was done at Portal for the purpose and for the intent to transfer his services for you individually at Noyes?

[fols. 353-381] A. He wasn't working for the Union Brokerage Company at Portal.

Q. What was the work he did at Portal that gave him the practice or experience?

A. Oh, I helped him make out some entries and showed him how to make some clearance sheets.

Q. And was that work done in connection with the plaintiff's business?

A. I don't remember whether it was done in connection with the business or as practice.

Q. Whether it was one or the other it was done with the secret intention on your part to make use of his services against the plaintiff at Noyes?

A. It was done with the intent of having him work for me at Noyes.

Q. Without any permission granted by the corporation?

A. That would be correct.

* * * * * * *

[fol. 382] Claude A. Phillips, called as a witness in behalf of the plaintiff, was duly sworn on oath and testified as follows:

Direct examination.

Mr. Eriksson:

Q. Will you give the reporter your full name?

A. Claude A. Phillips.

Q. And where do you live?

A. At Noyes, Minnesota.

Q. What is your business?

A. Railroad cashier at Noyes.

Q. And for which railway; are you cashier for both the Great Northern and the Soo at Noyes?

A. I am.

Q. They have a common depot at that point?

A. Yes, sir.

Q. In addition to that are you the deputy sheriff up there?

A. I am.

Q. How long have you been the cashier for the carriers at Noyes?

A. Since August 18, 1920.

Q. Will you please tell in your own language what the duties are of your position?

[fol. 383] A. I check all accounts, make railway settlements, pay customs duty and pay brokers clearance charges and handle various claims and——

Q. When goods come from across the border, subject to entry here in the United States, what is done by the railway or by you?

A. The papers are stripped, that is, the bill of lading and invoices and other papers——

Q. Well, right there I think we had better stop because I'm not so clear about that myself; what do you mean by papers?

A. The papers that the—that accompany the shipment to be delivered to the customs broker.

Q. And what are they?

A. Usually a bill of lading and stock contract, invoices and veterinarian certificates—various papers of that kind.

Q. And what about a waybill?

A. The waybill stays in the railway office.

Q. Are these papers attached to the car or in the possession of the conductor and if you have to qualify, please explain?

A. The papers are usualy attached to the waybill for the car. The waybill is the instructions to the railroad for the conductor handling the car.

Q. And when a car containing a shipment of merchandise into the United States from abroad—what is done with those papers?

[fol. 384] A. They are delivered to the customs broker to whom they are consigned.

Q. But first of all, before that is done, do you get them or does the railroad official in charge of the depot get them?

A. Yes.

Q. Does the conductor bring them into the depot?

A. The conductor brings them into the depot.

Q. And he does that without regard to whether the papers are assigned to one or the other broker, is that right?

A. Yes, sir.

Q. And when they do so come into the station what do you or those on duty do?

A. They usually sort the bills in piles for the various brokers and remove the papers.

Q. And when they have been so segregated or separated into piles for the respective brokers, then what happens?

A. They are usually pinned on—the pins are removed and they are piled up and delivered to the customs broker to whom they are consigned.

Q. Do these bills of lading and other papers attached to them ever show any—ever fail to show a broker consignee?

A. At times.

Q. Then in such cases, what is done?

A. The car is refused; that is, refused——

[fol. 385] that is, from the connecting line and we notify them of the fact.

Q. Notify who?

A. The connecting line; it can be the Canadian Pacific or Canadian National or the line that delivered it to the railroad line on this side of the boundary.

Q. That is, you or the party acting for the railroad notify the connecting line?

A. Yes, sir.

Q. In that event, is it true that the shipment is not either inspected or turned over to the customs or the broker or any broker until the connecting line furnishes new papers?

A. Yes.

Q. Are those instances rare or otherwise?

A. Oh, there are a few of them.

Q. So that, is it true or it is not true that each car that comes to your yard, that is, the yard of the Soo or the Great Northern, has, by either a waybill or invoice or bill of lading, the broker designated?

A. Yes, it has.

Q. Now, do you recall that in June or July, 1940, Mr. Jensen and Mr. Rime came to Noyes?

A. Yes.

Q. Prior to that time had there been a change in routing shipments into the United States from Canada?

A. I believe the date was July 1st that the routing was changed.

[fol. 386] Q. The change in routing became effective July 1, 1940?

A. Yes.

Q. Prior to that time what had been the routing?

A. Well, the Canadian Pacific decided they wished the long haul instead of delivering the west coast cars to the Soo Line at Portal; they hauled them through Winnipeg and down through Noyes.

Q. And that became effective on July 1st, you say?

A. Yes.

Q. In anticipation of that change, or in preparation for it, you as chief clerk there, can you give us any information as to whether or not the Soo had made any local improvements at Noyes or extensions of the yard service. If you don't recall, we won't stop to inquire about it.

A. I can't recall the dates that they made them.

Q. You can't recall the date?

A. I can't recall whether they were before or after.

Q. Well, were there improvements or changes in the yard there?

A. Yes, many of them.

Q. During that approximate period, is that right?

A. Yes.

[fol. 387] Q. And you don't remember the dates; from your experience as a chief clerk, together with other servants of the two roads, can you say whether or not the shippers sent invoices by mail to brokers?

A. Yes, they did.

Q. And in such cases what papers are conveyed to the broker at Noyes by mail?

A. Well—those I have seen are usually invoices.

Q. And what recognition is given to those invoices if mailed to the broker and presented by the broker at the station?

A. (No answer.)

Q. What I am trying to get at is if the broker presents invoices received by mail to you or to others working for the two roads, are they sufficient authority for you to deliver the bills of lading to that broker?

A. No, sir.

Q. What more has to be done?

A. The bill of lading has to be consigned to the broker.

Q. The bill of lading, in addition, has to be consigned to the broker. Well now, Mr. Phillips, it appears here that on June 29, 1940, Norman Jensen left some written directions—Plaintiff's Exhibit Q—did that come to your attention—did you see it, I mean?

A. Yes.

Q. And when you saw it you may state whether or not [fol. 388] you proceeded to follow the instructions?

A. I did.

Q. And you did so assuming that the Union Brokerage Company was in Noyes?

A. Yes.

Q. And beginning with July 1, 1940, can you state of your own knowledge whether or not shipments of various kinds came consigned by shippers to the Union Brokerage Company at Noyes?

A. I saw some of them.

Q. And to whom were those shipments so consigned delivered?

Mr. Murphy: Just a minute. May I ask a question?

Mr. Eriksson: Yes——

Mr. Murphy:

Q. You are speaking now, Mr. Phillips, with reference to certain shipments some time back in 1940 and what was done with them. Are there records that are maintained and kept by the railroad companies whom you serve which show the shipments and what was done with them?

A. There are no records that I know of.

Q. There aren't any records at all?

A. Not in possession of the railroad company.

Q. And you rely then entirely upon your memory?

[fol. 389] A. Yes, sir.

Mr. Murphy: Alright.

Mr. Eriksson:

Q. Well then—my question was——

(Question, line 21, page 280 read to witness.)

A. As far as I can—as I know, I can only remember delivering them to Mr. Rime.

Q. Mr. Rime?

A. Yes, sir.

Q. I'd like to make a brief reference, Mr. Phillips, to the requirements of law governing the papers evidencing the shipment of goods. As I understand it—you correct me if I am wrong— assume that a shipment starts out in Calgary, Canada, consigned to some one in Minneapolis, by way of Noyes—so far you understand me alright——

A. Yes.

Q. At the time that shipment starts out from Calgary consigned to, say, the — company at Minneapolis, what papers are attached to the car when it starts out?

A. The shipper would make out a bill of lading and several copies.

Q. How many copies?

A. Usually four in the case of the Canadian railroads and from the second copy the railroad company would make out a waybill; the second copy would then stay in the originating office——

Q. Wait a minute; I'd like to follow that; it is clear to you but not so clear to me. One copy the railroad com-[fol. 390] pany keeps in Calgary?

A. Yes.

Q. And the others?

A. The fourth copy would be attached to the waybill.

Q. And of the waybill is there more than one copy?

A. Except for railroad accounting purposes, no.

Q. Well, do they keep one for accounting purposes at the beginning point?

A. Yes, usually one, sometimes more.

Q. But there is one that is attached to the car?

A. Yes.

Q. And what does that waybill show?

A. Shows the car number, the date, waybill numbers, destination, originating station, the shipper, the route, the consignee, any hold over for icing or other care, then the commodity would be stated, the weight, freight weight or rate, I mean, amount to be collected and there is usually, in fact almost always, a list of all papers that accompany the shipment crossing the boundary.

Q. And does that paper you call the waybill indicate the name of the broker or does it not?

A. It usually does.

Q. It usually does indicate or state the name of the broker to whom that shipment is consigned for brokerage purposes?

[fol. 391] A. Yes.

Q. And does that waybill remain on the car until it is finally received by the ultimate consignee or consumer?

A. It stays on the car—travels with the conductor of the train but it does stay with the car until it reaches its destination.

Q. And that is the waybill, is it?

A. Yes, sir.

Q. Now, in addition to that you mentioned the bill of lading and what is the object and purpose of the bill of lading?

A. I believe the customs laws state that the holder of the bill of lading is the owner of the merchandise for the purpose of making entry.

Q. And the holder then is the designated customhouse broker?

A. Yes.

Q. Now, there is a provision in the—first I'll ask you if you are familiar with the Tariff Act of 1930 so that you know whether or not it provides for the issuance of the carrier's certificate in addition to any certificate issued at the point of origin of a shipment?

A. Yes, there is such a provision; I think it's 484 or something like that.

Q. Now, explain that provision as it is in practice, Mr. Phillips?

A. Where the original waybill was taken up by the customs broker and filed in the customhouse with the entry, [fol. 392] especially with ordinary bills of lading, it was found it was impossible to make deliveries of cars at the destination——

Q. And the word "destination" as used by you now, is that the residence or point of the broker or the ultimate consignee?

A. The ultimate consignee; and the provision was made so that the incoming carrier into the United States could make a carrier's certificate which states that the customs broker is the same as stated on the original bill of lading.

(Plaintiff's Exhibit DDD marked for identification.)

Q. I have here a series of papers, all connected and identified as Plaintiff's Exhibit DDD, and ask you whether or not the last sheet of this exhibit illustrates what you have just discussed, namely, the carriers certificate—the words at the bottom there?

A. It does.

Q. Is that the kind of certificate attached to such a shipment that we have been discussing coming from Canada being consigned to someone in Minnesota—is it granted at the point of beginning or point of origin?

A. It could be but——

Q. It could be. Now, if it is not that kind of a paper then what kind is it?

A. You have a copy of a bill of lading and were you speaking of this certificate alone?

[fol. 393] Q. Yes, this (indicating) certificate alone.

A. That could be but not usually.

Q. Now, to get this kind of a certificate which you have called a carrier's certificate what has to be done by a person at Noyes acting or seeking to act as a broker for a shipment consigned to somebody else for brokerage purposes?

A. That would have to be furnished by the originating railroad upon which the shipment originated.

Q. Well, assume in this case that a shipment comes consigned to Noyes, Minnesota, to the Union Brokerage Company and Mr. Jensen wants to take that and take it over to Emerson to get it changed so that he can act as broker for that shipment, what has to be done to do that?

A. The foreign railroad would have to furnish it and I don't believe it could be legally furnished without first taking it up with the originating station.

Q. Well, the first thing that has to be done, you correct me if I'm wrong, to get that evidence of brokeage consignment from someone at the depot in Noyes, is that right—you or somebody would have to give that bill of lading and invoice to Mr. Jensen or his man?

A. Yes.

Q. And before he could proceed to broker that particular shipment what would have to be done?

[fol. 394] A. He would have to furnish a carrier's certificate showing that it was consigned to him before the customs could allow him——

Q. Just a minute—where would that have to be issued?

A. The nearest place to Noyes would be Emerson.

Q. And to do that legally what has to be done?

A. They would usually telegraph the originating station and find out to whom it was consigned.

Q. Then in every such case where such a change is legally done there will be a telegraphic or telephonic record left of any such transfer?

A. There should be, yes.

Q. If it was done by telegraph or telephone?

A. There should be.

Q. And that would require, if it were done at Emerson, how much time, say, to get such authority from Calgary?

A. Oh, it usually takes about half a day.

Q. Now, do you know whether or not Mr. Jensen has taken shipments consigned to the Union Brokerage Company or his man, Mr. Rime, and returned with a carrier's certificate transferred over to himself or where would that be found; where can that be located?

A. Are you referring to any certain time?

Q. Well, say November 5, 1940; assume if we may for [fol. 395] the sake of the record that consignments—that shipments came consigned to the Union Brokerage Company and they were delivered to Mr. Rime or Mr. Jensen and there was a change in the certificate or——

A. I don't believe I had any knowledge that the certificates were being changed at that time.

Q. But where and how would such a change be discovered or be located?

A. The only place would be in the Canadian Railroad's records if there were any.

Q. Would there be any record at the customs office indicating a change?

A. Not unless you had the original papers.

Q. Without the original papers it couldn't be located, you think?

A. No.

Q. And the proper way to get a carrier's certificate to take the place of the original one sent out from the point of origin would be to get the shipper at the point of origin to authorize the railroad officials at Emerson to make the change?

A. Yes.

Q. And what has to be done to make a report of the desired change?

A. I don't just understand your question?

Q. Well; assuming that I am a broker at Noyes and I get hold of somebody else's shipment consigned to some [fol. 396] other broker and I take that broker's shipment or evidence of shipment for brokerage and go over to Emerson with that to get a carrier's certificate in its place, in the place of the one that comes with the original papers, what would I have to do to secure authority on the part of the railroad officials to make that change?

A. I don't believe any railroad official would have authority to——

Q. The railroad officials at Emerson have no authority to make such a change?

A. No, sir.

Q. Before they could make a change would they have to get a kind of authority from the original shipper?

A. The original bill of lading would have to be turned into one of the general freight office officials and a new bill of lading issued showing it.

Q. It appears, or it will appear, if it does not already do so, that Mr. Jensen left a stamp with his name on to be used in connection with some green ink to stamp on papers under certain circumstances and in certain cases; would such a stamp appear upon the papers presented in connection with the clearance of the shipment? I mean stamped impression on the papers.

A. It could appear on the bill of lading.

Q. And in such case state whether or not that would indicate a transfer or a change in the original papers?

[fol. 397] A. Well, the shipper could have a stamp and could have used it.

Q. I see—alright; now turn to another subject that concerns the accounting. As chief clerk for the two railroads operating at the station in Noyes, namely the Great Northern and the Soo, are you the man that has the custody and control of the funds of the two railroads paid out for duty and brokerage fees?

A. Yes.

Q. And in doing that what evidence do you have to have before you can pay out a dollar; in other words, what kind of an instrument or voucher does the broker present before they can get from you money for duty or fees?

A. I think that is optional as long as we get the list so we can check it and take care of the funds.

Q. The list is what I'm driving at; do they furnish a list?

A. Yes.

Q. Have you got the list in the case of Rime and Jensen?

A. I have them here.

Q. Are those (indicating) the originals?

A. I believe so. They were the lists used by the railroad company furnished by Mr. Rime——

Q. And the broker, whether it be Rime or somebody else, calling on you to pay them—pay duty or fees, they keep one, a duplicate?

[fol. 398] A. Well, I have no knowledge as to that.

Q. Are these (indicating)—I don't want to introduce them and encumber the record but what are these in this bunch so that Mr. Jensen and his counsel can follow us?

A. They are lists of shipments handled by Mr. Jensen with the amounts of duty and brokerage to bill on them.

Q. Well, you——

Mr. Eriksson: May I interrupt for a moment to ask Mr. Palda or Mr. Murphy to ask Mr. Jensen if you haven't got duplicates and if you will recognize them as a basis for the payments. They are the vouchers on which the payments are based, isn't that right?

Mr. Murphy: We will assume that is what they are.

Mr. Eriksson:

Q. These are all the vouchers or statements or whatever you call them that have been furnished by Mr. Rime and Mr. Jensen?

A. Yes.

Q. And are these the originals on which you have based certain calculations which I have asked for?

A. They are.

Q. So the calculations that you were to present are based upon papers of which Mr. Jensen and Mr. Rime have duplicates?

A. I think so.

Q. Will you produce the statement that I have asked for [fol. 399] showing the money paid by the carriers on the cars cleared and so forth since July 1, 1940 by Jensen and Rime?

A. Yes——

Q. Is that bundle of papers the statements that I have asked for?

A. Yes.

Q. And all of the sheets are directed to the same kind of accounting, is that right?

A. Yes.

(Plaintiff's Exhibit EEE marked for identification.)

Q. Showing you Exhibit EEE, that is a series of papers compiled by you on the basis of the bunch of papers that I have just handled and which you called what?

A. Clearance sheets.

Q. Is that a tabulation of facts appearing from those clearance sheets?

A. The list of drafts and the numbers of the drafts were not made up.

Q. From those sheets?

A. Yes.

Q. From what are they made up?

A. They are made up from the draft books.

Q. Have you got the draft books here?

A. I can get them.

Q. These vouchers that you have here, that you produced here, are they stubs or drafts that you have been using in paying this money?

A. The Soo Line are carbon copies; the Great Northern are stubs.

[fol. 400] Q. And in the case of those are the originals, either the original stubs or original duplicate copies of vouchers drawn by you?

A. Yes.

Q. And are all these records that you have before you now in these books, are they the original records of the two railroads for whom you have been working or acting in paying the money referred to on this Exhibit EEE?

A. You say original——?

Q. Well—duplicates—the original stubs or original duplicate copies——.

A. Yes.

Q. And are these figures based then upon these clearance sheets and the original record found here?

A. Yes, sir.

Mr. Eriksson: Again I certainly do not wish to introduce all these but counsel may see them and check them if he wishes.

Mr. Murphy: I have no ambition to undertake that enterprise but I understand that those are the original records from which he made up the compilation and the original records are open to us to check if we see fit to do so.

Mr. Eriksson: Yes——

Q. Now, turn to Exhibit EEE—I notice that there are four shorter white sheets on top of longer yellow papers; of what railroad are those first four sheets?

[fol. 401] A. Great Northern—the list of drafts paid to Norman G. Jensen, customs broker, by the Great Northern Railway.

Q. And the next yellow sheet relates to the Soo Railway, does it?

A. Yes, sir.

Q. And the first sheet is a tabulation of the total amount of money actually paid to him by the Soo Line, is that right?

A. Yes, sir.

Q. And the next series of sheets, what do they show?

A. It starts at July 1, 1940, and I made out a sheet for every month up to date.

Q. Up to date.

A. Up to December 1, rather.

Q. And what do the last sheets show—or what does the last sheet show?

A. The last sheet shows the number of shipments on which brokerage was advanced by the railway companies and the second column shows the number of shipments which were cleared but no advances were made by the railroad companies.

Q. So then, if we read the first four pages of this exhibit we find a detailed statement of the money paid to Mr. Jensen, the defendant by the Great Northern Railroad?

A. Yes, sir.

Q. And next we come to the amount of money paid to Mr. Jensen either in the form of drafts cashed or drafts issued but not cashed by the Soo?

[fol. 402] A. They are drafts issued for those amounts and we are charged up with them.

Q. They are liabilities or charged up to the railroad?

A. Yes.

Q. Whether he has cashed them or not?

A. Yes.

Q. And then follows the statement of shipments cleared by him by the month, is that right?

A. Yes.

Mr. Eriksson: We offer Exhibit EEE.

Mr. Murphy: Let me see it.

Mr. Eriksson: It's to take the place of the original records.

Mr. Murphy: Alright; we have no objections.

The Court: It may be received.

Mr. Eriksson:

Q. That shows that the Soo Line has paid drafts to the amount of $5,558.75?

A. Yes.

Q. And in addition there is held by the Soo on account of a garnishment $3,011.00?

A. Yes, sir.

Q. Now, as to the latter amount there will be no corresponding stubs or drafts for that $3,011.00?

A. No, sir.

Q. The drafts and stubs that you have referred to as being in these books relate to money paid by the Great Northern and the money actually paid by the Soo?

[fol. 403] A. That was actually paid.

Q. And then coming down to the last page the exhibit shows that there were 8,163 cars or shipments cleared by Mr. Jensen for which money has been paid, is that right?

A. Yes, including the garnishment.

Q. Including the shipments affected by the garnishment proceedings?

A. Yes.

Q. And the total number of shipments cleared for which he collected either cash from others or charged accounts against others was 10,160 cars or shipments?

A. Yes.

Q. In the case of those not advanced on by the railroad company they would be either accounts or collections made outside or aside from any collections made from the railroad?

A. Yes.

Q. So there have been approximately two thousand more cars cleared on which the railroad has no record at all than those on which the railroad advanced the fees?

A. Yes.

Q. At the present time are the fees charged against the railroad collected daily or otherwise by Mr. Jensen and Mr. Rime?

A. They are collected daily.

Q. In the case of those shipments which came consigned within your observation to the Union Brokerage Company but delivered to Mr. Jensen how long, if you know, how long [fol. 404] a time transpired between the time he got those and the time they were entered at the customs office?

A. Usually, I'd say, a very short while.

Q. An hour or half an hour?

A. Depending on the trains but if we got a train over at 4 o'clock in the morning and those cars would be set (?) out they'd usually come on the list and be out in the next train which might be six or two hours.

Q. The freight trains which bring in these shipments, do they come entirely during the night time or during the day time—in 1940 and the early part of 1941?

A. I believe they are due in Emerson about 4 a. m.

Q. Four a. m.?

A. Yes.

Q. And how long do they stay in Emerson?

A. They usually get the cut over in about an hour and a half.

Q. And at Emerson, which is the last Canadian port what is done there to clear the shipments for continued transportation?

A. The Canadian export papers are removed from the waybill and filed with the Canadian customs.

Q. And that leaves those designed for American use on the shipment?

A. Yes.

Q. On or connected with the car?

A. Yes.

[fol. 405] Q. Do you know who was on duty at Emerson in 1940, from July on, during the night shift?

A. T. A. Spear was in charge until very recently.

Q. Any other person there that you know of during the night shift?

A. Mr. Carlson was usually there.

Q. Mr. who?

A. Carlson—until about 2:30 a. m., and Mr. Elham part of the time.

Q. Was there a man named Baker connected with the railroad or Mr. Murphy?

A. Mr. Murphy was the agent until some few months ago.

Q. And what was his hours?

A. I can't tell you his hours; it was a day time shift.

Mr. Eriksson: That's all; you may take the witness.

Cross-Examination.

Mr. Murphy:

Q. I understand, Mr. Phillips, you are the cashier for both the Great Northern and the Soo railroads?

A. Yes, sir.

Q. You never were employed in the customs department at all?

A. Yes, before I railroaded I worked for the customs.

Q. How long ago was that?

A. That was before August 18, 1920.

[fol. 406] Q. Now, I don't know whether I understood these railroad terms or not. You know they are not as simple to us lawyers as they are to you as you have been using them every day but when a shipment of any sort originates, we'll say, in Calgary, to make it specific, the shipper makes out what you call a bill of lading?

A. Yes.

Q. In general what is this instrument or thing which you call a bill of lading?

A. That's the order specified by the Interstate Commerce Commission or the Canadian Commission which has to be filled out to move a shipment.

Q. Well, isn't it in the nature of a request or demand on the part of a shipper to the railroad to ship certain things to a certain place?

A. Yes.

Q. That is about what it amounts to?

A. Yes.

Q. And now when the railroad receives bill of lading are there more than one copy of that bill of lading at the time?

A. The shipper receives two of them back after being receipted for by the railroad company.

Q. The shipper receives two bills back?

A. Yes, sir.

Q. How many are there all together as a rule?

A. Speaking of a Canadian railroad and the shipment [fol. 407] crossing the boundary line there are usually four.

Q. Usually four and the shipper gets two back and one of them remains with the railroad office, I suppose, at the point of origin and the other one goes with the train?

A. Yes.

Q. Now, accompanying that bill of lading the railroad company gets, which I understand is in the nature of a request or demand by the shipper, they themselves make out an instrument called a waybill?

A. Yes, sir.

Q. And that goes into the details as to the shipper and consignee and number of the car and type of merchandise and the tariff and all the rest of it?

A. Yes, that's the instrument which moves the car.

Q. That's the instrument on which the railroad company moves the car?

A. Yes, sir.

Q. Now, those two papers are put together, I suppose, the bill of lading and the waybill?

A. As far as to the bill of lading for customs purposes—yes, that's usual.

Q. Well, the conductor is the man who is in charge of those instruments on the freight train?

A. Yes.

Q. Now, there was another instrument which you referred to as the invoices, what are they?

[fol. 408] A. The invoice is made out by the shipper or the owner of the goods showing the value, the amount and—

Q. Details and nature of the shipment?

A. Yes.

Q. That's the invoice and it also accompanies the bill of lading and the waybill?

A. Usually although it can be mailed by the shipper to the customs broker.

Q. Now, you say there was a custom, general custom, of shippers when they wished to designate a particular broker, to make some form of designation on one of these instruments; which one would that generally appear upon?

A. It would be made by the shipper on the bill of lading

but the railroad would have to show it on the waybill also.

Q. Now, then, if a shipper wishes to consign a shipment to a certain broker, we'll say, at Noyes, they should designate in some manner upon the bill of lading the name of the broker?

A. Yes.

Q. And the railroad company would also write the name of that broker upon the waybill?

A. That's correct.

Q. And then when that shipment arrives at the port of entry how would the broker come into possession of the bill of lading; from whom would he receive it?

[fol. 409] A. From the railroad agent.

Q. The conductor, when he arrives, turns these bills of lading and waybills all over to the agent, does he?

A. Yes.

Q. And then Mr. Broker goes there to the agent and asks if there are any bills for him?

A. Yes.

Q. The agent then turns the bills of lading over to the broker, those on which his name is indicated?

A. Yes.

Q. And what does the broker do with it then?

A. The broker?

Q. Yes.

A. He would fill out—depending on the time of day—he would fill out certain forms for the customs so that inspection of the car could be made.

Q. That is, he would fill out some form provided by the U. S. Customs to indicate that the car was there for importation subject to inspection by the customs office?

A. Yes.

Q. And file that with the customs officials along with the bill of lading?

A. No, the bill of lading would not be filed until later; it can be filed as much as 48 hours later.

Q. He would retain the bill of lading for awhile?

[fol. 410] A. Yes.

Q. Well, after the customs have inspected the shipment I suppose they would give some indication that they have passed the car for importation—that is, after their inspection they put a mark on it to show it has been inspected?

A. No, there's nothing of that kind; we know——

Q. You had some way of determining when the inspection is completed?

A. We send men right with them.

Q. That is, the railroad company does?

A. Yes.

Q. Alright—then what does the broker do in order to obtain these advancements of fees and duties from the railroad company; what evidence does he present to the railroad company to get a draft for his brokerage and for the duty?

A. He presents a list, as they were called awhile ago, a clearance sheet.

Q. He brings that sheet, similar to those you brought here, called a clearance sheet, and is there anything else that he brings, any bill of lading or any other evidence?

A. No, not to the railroad company.

Q. He merely brings in a so-called clearance sheet in which he shows that he is entitled to brokerage on certain cars?

A. Yes.

Q. And duty, I suppose——

A. (No answer.)

[fol. 411] Q. —Is it the practice and custom of the railroad company, the receiving railroad company in the United States to advance, in certain cases, the brokerage due to the customs broker?

A. Whenever it is asked for the law provides for that.

Q. That the railroad company pay it?

A. Yes.

Q. And also the duty upon the goods going to the government?

A. Yes.

Q. And the railroad company reimburses itself later, I suppose, from the consignee?

A. If is collected at the time the freight is collected.

Q. And that is the practice that the brokerage fees, wherever it is demanded, and the duty, wherever demanded, is advanced by the railroad company?

A. The Interstate Commerce law reads that custom fees and brokerage fees will be advanced for collection from the consignees.

Q. This instrument which has been brought here called Exhibit EEE——

A. Yes.

Q. You have four sheets of paper on the front of it in which you have three columns of figures on each one of them; the left-hand column, of course, is apparently the date column; the second column is headed "draft number"——

[fol. 412] A. Yes.

Q. —and the third column is headed "amount." You have a total on the first sheet which, I suppose, takes in all four sheets?

A. It does.

Q. In other words you are going backwards here—the total, $1,169.25, that represents the fees advanced by the railroad company to Norman G. Jensen?

A. Yes, sir.

Q. I can't make out the opening and concluding dates here but probably you can tell me.

A. From July 3, 1940——

Q. July 3, 1940? Where it says "1941" should be "40?"

A. Yes.

Q. That is why I was confused—July 3, 1940 to November 30, 1941?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And then we are to gather from that that the railroad companies, that both railroad companies——

A. No, that is the Great Northern Railway——

Q. The Great Northern Railway Company, during that period of time, advanced brokerage to Norman G. Jensen of $1,169.25?

A. Yes.

Q. Now, these other sheets here, do they refer only to the

[fol. 413] Soo Railway Company?

A. Yes.

Q. That is, the yellow sheets listing drafts?

A. Yes.

Q. They purport to give the same information or do they also include duties advanced?

A. No, there's no duties listed on those sheets.

Q. All of the figures then that are seen on here are brokerage?

A. Yes.

Q. Both the Soo and the Great Northern?

A. Yes.

Q. And the total paid then by the Soo Line is shown on this first sheet?

A. That's the recap.

Q. A recapitulation of the succeeding sheets and totals $5,558.75 which represents the brokerage advanced by the Soo Railway Company to Norman G. Jensen during the same period of time that we have referred to?

A. Yes, and paid by drafts.

Q. Paid by drafts?

A. Yes.

Q. Well, was there any other brokerage advanced?

A. There was $3,011.00 in the garnishment.

Q. Well, that hasn't been paid at all?

A. No.

Q. In other words you have been holding that up?

A. Yes.

[fol. 414] Q. Now, you have two sheets on the back end of this exhibit which purport to show—these (indicating) are duplicates, are they not?

A. Yes.

Q. —and it purports to show the number of shipments on which brokerage was advanced and the figures have nothing to do with dollars at all but the figure 8,163 means that there were 8,163 different shipments upon which brokerage was advanced by the railroad company?

A. That's right.

Q. That is both railroad companies?

A. Yes.

Q. And the other column is the number of shipments on which brokerage was not advanced—10,160?

A. Yes.

Q. And that covers both railroad companies?

A. Yes.

Q. Now, did I understand you to say, Mr. Phillips, that you had an independent recollection or memory of certain shipments which were consigned to the Union Brokerage Company at Noyes which were delivered to Mr. Jensen or to Mr. Rime for Mr. Jensen?

A. Yes.

Q. You have some definite recollection of that?

A. I know I handled shipments of that sort and I handled many of the papers for them.

Q. Now, do I understand you to mean that in those in-
[fol. 415] stances—about how many of those instances do you recall or have in mind now?

A. That would be very hard to state; I don't imagine I handled over ten per cent of the original papers but I have seen some.

Q. Well, I'm not speaking about what percentage you may have handled; I mean, how many of those do you recall yourself, basing it on your recollection only, that you handled, if any?

A. I couldn't compute any number on that.

Q. Well, would it be five or fifty?

A. I'd say it was probably in the hundreds but that is guess work on my part; we knew nothing was wrong, that they weren't being handled by the Union Brokerage Company and no track of them was kept or anything else.

Q. Your statement that you knew nothing was wrong, you mean that there was nothing illegal in what was done, is that it?

A. As far as I know.

Q. Did you not tell the court, in substance, that if a bill of lading came with a broker designated on it like, we'll say, the Union Brokerage Company, and that broker was not there to receive it to handle it, before a change could be made the originating railroad would have to furnish a so-called carrier's certificate?

A. Yes.

Q. And the originating railroad in order to acquire the authority to furnish that certificate would have to com-
[fol. 416] municate with the shipper and have the shipper make the designation?

A. That's the way they did it.

Q. In other words, if there is a shipment sent to the Union Brokerage Company and there was no one there to handle it for them some other broker made an application to the forwarding railroad for a shipper's certificate and that forwarding railroad would then have to communicate with the shipper and get the authority to issue the shipper's certificate?

A. Yes.

Q. That is all that amounted to?

A. Yes.

Q. And those are the instances you have in mind when you said there were certain shipments to the Union Brokerage Company handled by Jensen?

A. I believe I specified the date November 5th or Mr. Eriksson did; I don't know personally—I have no knowledge of that being done before—until after November 5.

Q. After the 5th of November, 1940?

A. Yes.

Q. Well, what I mean is that if it was done it was handled in the proper legal manner?

A. I don't know; I didn't handle them.

Q. You didn't even handle them yourself?

A. I handled none of these applications for change in brokers.

Q. The evidence before you or your railroad company either in the form of a carrier's certificate was there, was [fol. 417] it not, in each instance, authorizing the change of brokers?

A. We never saw those; those are filed with the customs.

Q. Those are filed with the customs department so the railroad company pays no attention to that?

A. No, they make delivery to the broker specified when they come with the waybills.

Q. To the broker specified?

A. Yes.

Q. But I'm trying—I'm thinking of a case where the broker specified isn't there to handle them and some other broker appears with the bill of lading. Take, for instance, a shipment sent to the Union Brokerage Company and the Union Brokerage Company has no man there to handle it for them and Jensen or Rime shows up; now, how does he acquire the right to handle that particular shipment?

A. The only way is by the connecting line taking it up with the shipper or the customs would not allow it to be entered.

Q. Yes, exactly; and all of these instances that you spoke about were handled that way, weren't they?

A. I can't tell you that.

Q. You'd have to go to the customs office to find out whether that is true or not?

A. Yes.

Q. The railroad company would honor Mr. Jensen's bill [fol. 418] of lading or clearance sheet regardless of that?

A. We had that order from Mr. Jensen.

Q. That is, if he presented a clearance sheet you would honor it anyhow?

A. We had that order, yes.

Q. What order?

A. That Mr. Eriksson showed me here.

Q. Oh, you mean after you had that paper?

A. Yes.

Q. I see. Alright, now all of the drafts or vouchers that are mentioned in this Exhibit EEE—all those that you have listed, those were all made out to Norman G. Jensen, weren't they?

A. Yes.

Q. None of them made to Mr. Rime in his name at any time?

A. No.

Mr. Murphy: I think that is all.

Redirect examination.

Mr. Eriksson:

Q. Mr. Murphy and perhaps I too have been talking about shipments; those that you have listed on Exhibit EEE are the cars, so many cars?

A. Not exactly; they are shipments as near as I can specify.

Mr. Murphy: They needn't be full cars and they'd be a shipment—might be less than a car?

[fol. 419] A. Well—every one is a shipment——

Mr. Eriksson:

Q. Well, these 19,000 shipments, in round numbers, that we in our inexpert way talk about, are they so many or what are they; will you please explain that?

A. Oh, I get it; they would be shipments in this way that there may be several in one box car of merchandise but they would be handled precisely as a car load and there may be, for instance, as in the case of telepgraph poles, two or three cars covered by the one length of poles and they'd be handled as one shipment.

Q. So that sometimes there are two or three cars counted as one shipment and again just an item in a car?

A. Yes.

Q. Now, with respect to this paper that I have here, Exhibit Q, from your last answer to Mr. Murphy's question, is it true that you relied on that paper in delivering the shipments consigned to the Union Brokerage Company to Mr. Jensen as its representative there?

A. Yes.

Q. And you just acted upon that as if he was working for the Union Brokerage Company?

A. Yes.

Mr. Eriksson: That is all, Mr. Phillips.

Mr. Murphy: That is all.

(Afternoon recess.)

[fols. 420-423] Norman G. Jensen recalled for further cross-examination under the statute.

* * * * * * *

[fol. 424] Q. You testified yesterday, I believe, that when these shipments came consigned to the Union Brokerage [fol. 425] Company you took them and took them over to Emerson there to be transferred by some official of the C. P. R., is that right?

A. I testified that my instructions were to take them back there knowing that I wouldn't be there much myself.

* * * * * * *

[fol. 426] Q. Didn't you leave some money with one of those men?

A. We have.

Q. How much did you leave?

A. I don't remember.

Q. With whom did you leave it?

A. With the agent of the C. P. R. as Mr. Rime tells me: I never left any; Mr. Rime left it there.

Q. And you did leave a stamp there?

A. We left a stamp there.

Q. And that stamp was used to change the certificate from the Union Brokerage Company to Norman G. Jensen?

A. It was used to fill in the certificate on those bills of lading that were designated as coming to me.

Q. After they'd been—after the carrier's certificate had been changed?

A. We aren't thinking in the same line of though-, Mr. Hermanson.

Q. Well how do you know? I'll put it this way so that we will get together on the same track. You say that—you testified that you had a stamp left there?

[fol. 427] A. Yes.

Q. That stamp wouldn't be and was not used until a change had occurred in a bill of lading consigning, for brokerage purposes, the shipment in question, to a broker located at Noyes, isn't that right?

A. No, the stamp was left there, if I may use this (indicating).

Q. You are now speaking of the last sheet of Exhibit DDD?

A. Yes—some shipments coming to be cleared by Norman G. Jensen, they are written throughout the body of the bill of lading and the customs has maintained that this certificate (indicating), has to be filled out as well and since they maintained that—we always maintain that the customs is right whether we agree with them or not—we gave the C. P. R. agent a stamp to fill this in so that he wouldn't have to write it in over there. They maintain that has to be filled in before it comes across the line.

Q. You mean the C. P. R.?

A. The customs maintains that has to be filled in before it leaves Canada.

Mr. Murphy: You are speaking now of the *ac*rrier's certificate?

A. The carrier's certificate on the bottom of customs bill of lading, C. P. R. Form 9.

Mr. Eriksson:

Q. What other customhouse broker has, during this time, [fol. 428] gone through that kind of practice?

A. I don't know.

* * * * * * *

A. I can't think of any such practice.

Q. If I have followed you correctly you testified that shipments which in the body of the bill of lading designated you as the customhouse broker were nevertheless, according to the customs regulations or rules, required to be stamped at Emerson before the car could go into Minnesota, is that right?

A. Well, not necessarily before the car could come in here but the Collector of Customs ordered that the bills of lading must be marked or the certificate at the bottom of the bill of lading must be marked showing the broker and that marking must be done by the incoming carrier.

Q. And when was that order made?

A. I don't just know when that order was made.

Q. When were you advised of it?

A. I don't remember that date either.

[fol. 429] Q. By whom were you advised of it?

A. The collector himself told me that.

Q. Name him.

A. Mike E. Christianson.

Q. That is the one that is deputy collector of customs at Noyes, Minnesota?

A. At Noyes, Minnnesota.

Q. And you have no idea when that was made—when that order was made?

A. Made about the time that I started up at Noyes—maybe a few days before—maybe a week or two before or whenever I happened to see him.

Q. But if these bills of lading definitely designated you as the broker consignee what reason have you to testify that such papers needed any altering or changing or doctoring of any kind?

A. Just the order of the Collector of Customs. He said that certificate must be filled out and when that's his order we plan to live up to it.

* * * * * * * *

[fol. 430] Q. Whatever meeting it was, is it true that [fols. 431-434] you were called to Winnipeg on account of the practices that you had pursued at Emerson to get business from other brokers, business consigned to other brokers?

A. The way you put it I'll have to answer it no.

Q. Well, then, if there is anything the matter with the question it is because I don't know the particular time and evidently you do know so tell it in your own way.

A. I was called to Winnipeg to attend a meeting of several brokers along with the C. P. R. agent from Emerson and I attended that meeting.

Q. Who else attended that meeting?

A. Mr. Rime, Mr. Mackay——

Q. When was that meeting?

A. Sometime during the summer; I don't remember just what date.

Q. 1941?

A. 1941.

Q. And as a result of that meeting this kind of practice that you have described has been absolutely forbid at Emerson, isn't that right?

A. Well, there was a change in practice of stripping the bill of lading at Emerson either prior—or at this particular time and I don't know if it had any connection with the calling of that meeting or not.

* * * * * * *

[fol. 435] Curtis M. Rime, one of the defendants, called by the plaintiff for Cross Examination under the statute, was duly sworn and testified as follows:

Mr. Eriksson:

Q. Mr. Rime, your name is Curtis M. Rime?

A. Yes, sir.

Q. How old are you?

A. Thirty-four.

Q. And you have been the principal of the Portal school——

[fols. 436-437] A. Yes, I have.

Q. —for how many years?

A. Three.

Q. What college degree, if any, have you got?

A. Valley City State Teachers College.

Q. And any other degree?

A. No, only advanced work on my Masters at the University of Southern California.

Q. The University of Southern California?

A. Yes.

Q. And are you a citizen of North Dakota or a citizen of Minnesota?

A. At the present time I'd be a resident of Minnesota; I think that's what you meant.

. . . . . .

[fols. 438-439] Q. He came to you—and after he had talked with you and you with him about that enterprise, did you then confer with him about the nature and responsibilities of that business?

A. Well, after I found it out I tried to—finally tried to find out what to do or he showed me what to do.

Q. And that was shown to you in the Union Brokerage Company office?

A. Yes, it was.

. . . . . .

[fol. 440] Q. Well, had you come to an agreement or understanding on it by the 29th day of June, 1940?

A. Well, we had come to an understanding that I was supposed to work for Jensen, yes.

Q. And the work you were to do for Jensen was to handle business that had been handled for customers or shippers at Portal?

[fols. 441-442] A. Well, I was supposed to handle the business for Jensen.

Q. At Portal?

A. No, at Noyes.

Q. Yes, that's right; and the business you were to handle for him at Noyes was the business to be gotten from the customers of the Union Brokerage Company prior to July first?

A. No, that I wouldn't know.

Q. You found out afterwards though, didn't you?

A. Found out afterwards——

Q. You found out afterwards that they had that business and that the business which you folks received at Noyes, Minnesota, was business from the people that had formerly done business with the Union Brokerage Company at Portal?

A. Yes, I believe some of them were.

Q. Most of them, if not all, isn't that right?

A. I still couldn't answer; well, I'll agree with you.

Q. Well, I don't want you to agree; isn't that the truth—isn't that the truth that the business that you have done at Noyes, Minnesota, came from the customers listed on Exhibit F, which is the list of customers of the Union Brokerage Company at Portal?

A. I have never seen Exhibit F.

Q. You haven't seen that?

A. No.

* * * * * * *

[fol. 443] Q. I don't think so but we will leave that subject for the present. Now, in actual operation of the business at Noyes, Minnesota, you saw and understood that Mr. Jensen, whenever he was around, usually stayed either on the Canadian side or the North Dakota side of the boundary, isn't that right?

A. Yes, that's right.

Q. And you understood that he did so because he didn't want to be on the Minnesota side?

A. I know he was kidded about it.

Q. And he gave directions for the transaction of business from either the Canadian or North Dakota side?

A. Not always.

Q. Many times?

A. Well, not so many times either.

[fol. 444] Q. Sometimes?

A. Sometimes he did, yes.

Q. And then when you began to operate the business at Noyes, you know of your own knowledge, don't you, that the shipments came consigned to the Union Brokerage Company?

A. I know there were some, yes.

Q. There were a good many in the course of the months?

A. No, I don't believe that.

Q. Whatever there were, they were taken over by you or Mr. Jensen, isn't that right?

A. Yes.

Q. And you understood and admit now that you were able to do that because of that paper that Mr. Jensen had left with the Chief Clerk on the 29th of June, 1940?

A. I know that now, yes.

Q. Well, you did at all times, didn't you?

A. Not necessarily, no.

Q. Not necessarily?

A. No.

Q. And those shipments or the evidences of such brokers consignments were taken over to the C. P. R. by you or by Mr. Jensen, isn't that right, through the Canadian side?

A. That's right.

Q. And there you prevailed or secured the—prevailed upon the officials of the C. P. R. or secured their consent to have the certificates changed on those Bills of Lading so that you could make entry?

[fol. 445] A. Not necessarily.

Q. What do you mean by "not necessarily"; I would like to have positive answers; you did, didn't you?

A. Oh yes, I did.

Q. Yes—and you understood all the time that without such change you couldn't under your power of attorney or Mr. Jensen couldn't use—couldn't under his license broker those shipments?

A. That's right.

* * * * * * *

Q. Why did you resort to that practice?

A. Because they refused to allow me to make entry at the customhouse.

Q. That is, the custom officials refused to let you act as broker on the shipments consigned to the Union Brokerage Company?

[fol. 446] A. Yes.

A. And so, to avoid that regulation, you did, and Mr. Jensen did what you have just described?

A. Yes.

Q. And the thing you did consisted of what we have talked about this afternoon, namely, that the stamp was left with the man in Emerson, isn't that right?

A. It was.

Q. And did you or Jensen deliver that stamp?

A. I believe I delivered it.

Q. And from who did you get it?

A. I got it from the office.

Q. And who provided it for the office?

A. Jensen.

Q. And that stamp contained what—have you got the stamp here or can you tell us what was on that stamp?

A. Norman G. Jensen is all.

Q. Is that all?

A. And then too—Norman G. Jensen and Noyes, Minnesota.

Q. And that stamp was gotten before or after July 1, 1940?

A. It was either just after I came over—I believe it was sent up by the company in Fargo.

Q. In other words, it was ordered by Mr. Jensen from some stamp maker at Fargo to be on hand July 1st?

[fol. 447] A. That's what I would say—yes.

Q. And it came either the first or second or third of July, 1940?

A. Well, I believe that's right.

Q. And since that time it was used until some date this fall, isn't that right?

A. No, that's not true.

Q. How long was it used?

A. I don't know; I believe it's still used.

Q. Well, that's what I just said, it's been used ever since it arrived until the present time?

A. That's right.

Q. And the purpose for its use has been the same all the time, has it not?

A. Oh, I don't know about that;—has to be used to properly make out a bill of lading, that's right.

Q. And that is done to enable you or Jensen or both to clear shipments that otherwise you couldn't clear because of the original consignment?

A. No, that isn't exactly true.

Q. Well, give us the exact truth as you have it because you say it isn't exactly true; in what respect is it not true?

A. If a bill of lading comes with the name "Norman G. Jensen" for clearance written across the face of it, the customs refused to accept it maintaining that is not correct but if the contract, as I call it, in the bottom, is filled in [fol. 448] then they will accept it and they have told me that I have to have the incoming carrier fill in this contract.

Q. Now, is that what you mean now?

A. Yes, that's right.

Q. And who has told you that?

A. I was—they refused to allow me to make entries on these bills of lading and I have to take them to the C. P. R. to get them——

Q. Who told you that they couldn't be entered or cleared without that?

A. The Collector of Customs.

Q. What's his name?

A. Mr. Christianson.

* * * * * * *

[fol. 449] Q. You said that you have used this stamp partly because or at least you have used it because you said the Collector of Customs has given you some instructions?

A. He didn't give instructions; he refused to allow——

Q. He refused to allow the entry?

A. Yes.

Q. That's right—now, my question is this: is it not true that when shipments came consigned to the Union Brokerage Company, for example, or some other agent or some other broker whose business you or Jensen claimed, that in such cases these bills of lading were taken over and the stamp used to get the proper carrier's certificate so that clearances could be made?

A. That's true.

Q. And that practice has prevailed since July 1, 1940?

A. That's true.

Q. And you are engaged in that practice now?

A. We are.

[fols. 450-451] Q. Who, if anyone, connected with the C. P. R., has assisted in the execution of that practice?

A. Well, when we come over there they take it for granted that—it's done under their supervision and I do it myself.

Q. You do it?

A. Yes.

Q. What do they do to either approve or disapprove or disapprove of that?

A. Well, if we received them at the Noyes depot naturally they take it for granted that they are ours.

Q. At the Emerson station?

A. Yes.

Q. And if you get them at the Emerson station then what do the officials of the depot there do?

A. Well, they make sure that they are ours, or Jensen's, and then they give them to me.

Q. And what do they do or what do you do to assure them that that's correct?

A. I fill them in properly if I know they're supposed to be Jensen's.

Q. You fill them in right there at Emerson?

A. Yes.

Q. You say when you know they are Jensen's?

A. Yes.

[fol. 452] Q. Well, say in July, a year ago, in July, 1940, when you got a shipment consigned to the Union Brokerage Company as broker consignee and you took it over for changing to Norman G. Jensen and the application of that stamp, what did you do then?

(Last question read to witness.)

A. I didn't get it.

Q. All right, if you don't understand it I'll try it again; you have testified, have you not, that in July and for sometime after that shipments would come consigned to Union Brokerage Company, that's right, isn't it?

A. There were some, yes.

Q. And in such a case, you would take those over or do something with them to get them cleared by Jensen because the customs had ruled you couldn't clear them unless such a change was was made, isn't that right?

A. That's right.

Q. Now, I'm asking you to recall one such shipment and answer this question: What did you do to secure the change?

A. You mean what did I do at Emerson to secure the change?

Q. Yes, or at Noyes, or both?

A. Well—what did I do to——?

Q. To get these papers changed so that they could be cleared in Jensen's name?

A. I took them back there and said——

[fol. 453] Q. Took them back where?

A. To the C. P. R. and I said—I told them that the customs refused to clear these shipments or wouldn't

let me make entry on these shipments until they were properly filled in.

Q. And then what did you do?

A. And I gave—well, I gave them a stamp first; it would be hard to write them all in so I gave them a stamp in place of writing them all out.

Q. And besides giving them the stamp to use what else was done?

A. That was all.

Q. Well, didn't you detach some papers and substitute another?

A. No.

Q. What did you do to the papers that previously had been unacceptable to the customs?

A. Merely filled in the contract on the bill of lading.

Q. We have here or I have here a dummy set up of papers for the purpose of showing how a shipment is cleared; now, will you please take this, which is identified as Plaintiff's Exhibit DDD and tell us where the change was made, what it was before the change was made and what it was after the change was made by the use of this stamp under your control turned over to the C. P. R. officials?

A. Well, if a bill of lading—it is written in somewhere in the body here (indicating) that it is to be cleared by some-[fol. 454] one, the U. S. Customs refused to accept it because it is no good they claim.

. . . . . .

[fols. 455-456] Q. The number of papers was so considerable coming in that manner that in the interest of time saving you used the stamp to put Jensen's name on?

A. Yes.

Q. And who was the agent at the C. P. R. station at Emerson with whom you worked most of the time in effecting these changes?

A. That might be anyone who happened to be there; Mr. Murphy was there at that time.

Q. But the man in the night time—freight usually came in during the night, didn't it or in the early morning?

A. At what time of the year?

. . . . . .

[fols. 457-463] Q. Did you follow and carry Mr. Jensen's instructions out when you did so?

A. Well, I believe they were his instructions.

Q. You executed them?

A. Yes.

Q. To the best of your ability in doing this as well as other things?

A. Yes.

. . . . . .

[fol. 464] Q. Didn't you understand it that the paper was authority on which the railroad officials acted in delivering you shipments or bills of lading consigned for clearance by the Union Brokerage Company?

(Last question read to witness.)

A. As far as I know it is.

. . . . . .

[fol. 465] Q. And have you the deposit slips and monthly statements from that bank?

A. I have.

Q. And will you produce those also?

A. I'll try to get those.

Q. I don't want to ask many more questions in regard to the clearance of shipments but isn't it true, Mr. Rime, based upon your own knowledge and experience at Noyes, Minnesota, that unless the bill of lading is changed in some manner, in cases such as we have discussed, if you remember that, there can be no such thing as clearing the shipment by another broker—if you don't understand that question I'll put it in parts?

A. Put it in parts.

Q. Well, take a shipment consigned to the Union Brokerage Company at Noyes in July or August, 1940, one of those shipments that came consigned to the Union Brokerage Company as broker consignee, we'll say, you understand that?

A. Yes.

Q. And then you want that to be transferred to Norman G. Jensen, we'll say, you understand that?

A. Yes.

Q. And now, isn't it true, that in that case you couldn't secure the transfer of that shipment to Norman G. Jensen. [fols. 466-467] for brokerage purposes unless the bill of lading itself was changed in some material particular?

A. You mean the entry couldn't be made unless it was changed?

Q. And you couldn't get the entry changed so as to act as broker without changing the bill of lading?

A. That would have to be done yes.

Q. Now then, bearing your last answer in mind, is it not true, that when you went over to Emerson that you, either alone or in conjunction with some one of the officials of the C. P. R., made some material change in the bill of lading?

A. I would say it was changed, yes.

Q. And in doing that you understood that you were doing the irregular thing, isn't that right?

A. No, I didn't.

* * * * * * *

Q. You never wired in a case of that kind the shipper named in such a bill of lading for authority to make the change, did you?

A. I never wired, no.

[fols. 468-479] Q. Well then, I want to have you understand that my original question on that subject related to cases where you had brought the papers to Spear over at Emerson for changes—did you ever see anybody wire for instructions in regard to changes that you desired?

A. I never watch them do those things.

Q. Well, did you see any?

A. No.

* * * * * * *

[fols. 480-481] NAN W. ANDERSON, called as witness in behalf of the plaintiff, was duly sworn on oath, and testified as follows:

Direct examination.

* * * * * * *

[fol. 482] Q. You were present, of course, at the meeting held on November 5, 1940?

A. Yes, I was.

Q. Where was that meeting held, in Mr. Jensen's office or in Harry Kramer's office?

A. It was held in Mr. Jensen's office.

Q. When, in the course of that meeting, did you find out that the permanent books of record of the company, such as ledger, journal, bank books, had disappeared?

A. Almost immediately after we arrived.

* * * * * * * *

[fol. 483] Q. Now, at that meeting, can you recall what Mr. Jensen said on the subject of an agreement with Mr. Mackay?

A. He said that there had been an agreement and that Mr. Mackay showed it to him at his home.

Q. And did he explain to you at that meeting what that agreement provided?

A. He said that the Union Brokerage Company couldn't operate in District 34, which included Noyes, and he said that Mr. Mackay was not to operate in Portal.

Q. And what, if anything, did he say about the amount of business done at Noyes?

[fols. 484-555] A. He said there was a very, very small amount of business done at Noyes—that he hardly took in enough to pay Mr. Rime $80.00 a month.

* * * * * * * *

Q. And what was said according to your recollection by Mr. Mackay and Mr. Jensen, if anything, in regard to this alleged agreement?

A. Well, Mr. Jensen said that Mr. Mackay had showed him the agreement and Mr. Mackay, of course, said he didn't because there was no such agreement and there never had been.

Q. Had you ever heard or known of any such agreement before?

A. I never had.

* * * * * * * *

[fol. 556] William F. Mackay, sworn as a witness in behalf of the plaintiff, testified as follows:

[fol. 557] Direct examination.

Mr. Eriksson:

* * * * * * * *

Q. And what is your business?

A. Well, I have several businesses; I am Supervisory agent for the Soo Line Railway Company, for the Great Northern Railway Company and for the Railway Express Agency and I am also the United States Customhouse Broker——

Q. Now, the first position, I hadn't known about that before; what was that first please?

A. Supervisory agent——

Q. Will you please explain, in a general way, what that covers?

A. Well, my work has been mostly special work for the department and—the traffic department of the Great Northern and Soo Line Railways; they have depended on me [fol. 558] for customs laws and wherever they had had trouble in respect to them they have asked me to come in. I am away from home perhaps a third of the time.

Q. I see—and how long have you been supervisory agent for these two roads?

A. Since 1905.

Q. And have they had, during all this time, a common depot?

A. They have.

Q. And the trackage for the service of the freight, is that common property or distinct?

A. As far as the buildings are concerned they own fifty percent.

Q. Each owns——

A. Each company owns fifty percent; they have their own right of way and their own tracks.

Q. I see—and how long have you been a customs house broker?

A. Forty years.

Q. And have you been such customs house broker for the forty years at Noyes or prior to then where were you located before?

A. Thirty-five years at—thirty-six years at Noyes and the balance over at St. Vincent which is four miles from Noyes.

Q. I see—and St. Vincent, that is in North Dakota or Minnesota?

A. Minnesota. That used to be the port of St. Vincent for a number of years; after the Noyes station was opened [fol. 559] it was still the port of St. Vincent for the reason

that it took an Act of Congress to change the name of the port.

Q. And that has been discontinued as a port of entry then for sometime?

A. Yes, sir.

Q. Are you familiar with the various developments of the laws relating to the handling of customs?

A. I am.

Q. Are you familiar with the Tariff Act of 1930 as well as with the modifications effected by that law?

A. I am.

. . . . . .

Q. Now, it already appears in evidence that, and that is your understanding, that District Number 34 includes [fols. 560-561] at least Kittson County within its borders?

A. It does.

. . . . . .

[fol. 562] Q. Now, returning to June 29, 1940, where did you meet Mr. Jensen?

A. On the night of June 29, 1940.

Q. Where?

A. Where at—at my home; he came to my house.

Q. Late in the evening or early in the evening?

A. It was late in the evening; I imagine around 8:30, it was just beginning to—it was dusk.

Q. All right—now please tell the conversation between you and Mr. Jensen on that occasion?

A. Well, Mr. Jensen introduced himself to me; I didn't recognize him and he said that he had met me once before and that he had come over to Noyes to see me—that they were following the business to Noyes from Portal——

Q. Following the business from——

A. —their business from Portal to Noyes.

Q. I see——

A. And Jensen—and intended to open an office at Noyes and he wanted me to agree not to handle or engage in any of the west coast business and if I'd agree not to handle any [fol. 563] of that business, he would agree not to handle any of the business that I'd been handling and I told him that I didn't think that would work very well, that some of the shippers that had shipped from the coast through

Portal had also been shipping through Noyes and that I had handled some of the business for years through Noyes and I asked him what I was to do if some of these shippers should write to me and ask me to handle the business and he said, "Tell them that you don't handle that business and I'll tell your clients the same if they ask me to handle theirs," and he told me that he had talked to Mr. Plow, the General Freight Agent of the Canadian Pacific Railway and told him that he was opening an office at Noyes to follow their business there from Portal——

Q. Is that what he said to you?

A. That's what he said to me and that Mr. Plow had told him that the railroads would not tolerate any cutting of charges by brokers, that it interfered with their business and he'd asked him to arrange to attend a meeting that Mr. Plow intended to have called in Vancouver—a meeting of brokers for the purpose of agreeing to uniform charges and that he'd told Mr. Jensen that he was to increase the charges to what the other brokers had been charging because Mr. Jensen had come into Portal and cut charges there and he said that Mr. Plow wanted him to go immediately but that he couldn't go for a few days, he [fols. 564-568] had to go back to Portal first and he did that and went and he was hardly gone from my Office when Mr. Plow called me on the telephone and told me that——

. . . . . .

Q. And was any agreement of that kind or any other kind involving such an arrangement shown, discussed or handled in any manner whatsoever?

A. No such thing was ever talked on; to the contrary I asked him if they were coming over to open an office at Noyes why they didn't let us act as their agent and he said, "I never thought of that."

Q. Did you ever have any such agreement with the Union Brokerage Company?

A. Never at any time.

Q. What's that?

. . . . . .

[fol. 569] Q. Now, at the present time, you are a director of the Union Brokerage Company?

A. I am.

Q. And acting as its agent, is that right?

A. That's correct.

Q. In the business way at Noyes, Minnesota?

A. That's right.

Q. And since when have you been such agent?

A. I can't give the exact date of that but it was when Harry Kramer left the company and I accepted the position as director to save—to recover the business that had been lost through Jensen.

Q. We have the date of Harry's resignation so we can cover that alright——

* * * * * * *

[fol. 570] Now I'll show you Plaintiff's Exhibit DDD which is a dummy entry, as I call it, and my knowledge of this business is so small that I hardly dare to speak about it but, in order to make the record clear, especially with respect to bills of lading, their make-up and significance and the carrier's certificates that have been talked about to some extent, I wish you would take this Exhibit DDD and explain to the Court if there is a bill of lading attached and what a bill of lading shows as the shipment begins?

* * * * * * *

[fol. 571] Q. This exhibit is not received in evidence because I don't want to offer it until it has been identified as to each part; first of all, is this DDD an illustration of an entry from its inception to its completion?

A. Yes.

Q. Now, considerable has been said about a carrier's certificate and Mr. Phillips and Mr. Jensen, I think, agree that the printing on the last page of this dummy, printed in red is a sort of a carrier's certificate, now, is there more than one kind of a carrier's certificate used?

A. Well, I'll tell you; a carrier's certificate is not required [fol. 572] at all; the only intention of that is to inform the collector of customs who has the authority to make the entry; now, it isn't necessary to have a carrier's certificate on a bill of lading if the bill of lading itself shows any-

where that it is consigned to someone the shipment, under the law, is deemed to belong to the consignee.

Q. That is the broker consignee?

A. Well, either one——

Q. Now——

A. —sometimes an importer might want to make his own entry and he wouldn't show any broker's name; he would simply consign the shipment to himself and he would appear at the customhouse with the bill of lading and present it and make the entry in his own name.

Q. Is there anything in the law or regulations which permit a change in that certificate or bill of lading from one consignee to the other?

A. Yes. Can I explain how that came about in the first place?

Q. Yes.

A. Previous to the 1930 Tarjff Act the Collector required the original bill of lading as authority for making the entry and that caused so much trouble—the importer had to give bond for the production of that bill of lading at a later date—and in many cases the original bill of lading couldn't be produced because it was used commercially and it made [fol. 573] so much trouble that they changed the law in 1930 and permitted entry either on the bill of lading or a true copy of the bill of lading certified by the carrier to be a true copy or else on a carrier's certificate certified—certifying that the shipment was consigned to so and so for customs clearance and the idea of that was the collector—it relieved the collector from all responsibility, that is in permitting someone to make an entry because the carrier who issues a carrier's certificate is held accountable and if anyone sustains a damage though the act of the carrier in issuing that carrier's certificate the carrier is liable for that and the carrier is not supposed to issue a carrier's certificate except in accordance with the waybill which is in the possession of the carrier.

Q. Now, the invoice—I am not so clear on the invoice—is the invoice attached to the bill of lading and waybill or is it made up at the station?

A. As I recall the bill of lading is attached—there are invoices—copies of the invoice any way attached also but sometimes the invoices come by mail.

Q. Sometimes the invoices come by mail?

A. Yes.

Q. And the first paper attached to that Exhibit DDD, will you kindly explain that?

A. You mean——

[fol. 574] Q. That first little paper in the corner (indicating?)

A. Oh, that is a card that is filed with the entry, where there is anything lacking, that is, missing documents such as a consular invoice that is to follow later; you have six months in which to produce that, under bond, and this card gives the collector authority to charge the amount *up* against your bond for the production of that missing document whatever it may be.

Q. Now, just one more question on that—I believe that the law provides that the broker has 48 hours in which to clear a car or shipment, is that right?

A. That just depends if he has what is called an immediate delivery bond; under that bond he has the right to delay his entry for 48 hours but he must get it within the 48 hours or he is penalized the value plus the duty.

Q. And do you know what kind of a bond Mr. Jensen has filed at Noyes?

A. He has an immediate delivery bond filed.

Q. And a bond—all bonds of the brokers have to be filed at the port of entry where he does his business, is that right?

A. Well, they have changed that recently and they're filing them now in the district office.

Q. In the district office?

A. That is, in the collector's office—these sub ports are in charge of deputy collectors and the collector's office is [fol. 575] in Pembina, that is the district office.

* * * * * * * *

Q. Now then, by stamping the invoice or signing the name of the broker to the invoice and leaving that with the bill of lading and—the original invoice or duplicate—then does the collector dispatch an inspector to inspect the shipment to see——

A. No, he doesn't deliver the bill of lading; he delivers one copy of the invoice and notes on the back in some way that he has authority to clear that shipment then the inspector goes on and makes an inspection of the shipment

and the shipment is released and, as far as the railroad is concerned, and it goes forward.

Q. In practice then that service of the broker aids the interstate and foreign commerce through the ports?

A. Yes.

Q. Now, there has been some talk about the papers that the broker must keep and I am not quite clear—I think Mr. Jensen said that the inspector, Mr. Nelson, had the right [fol. 576] to O. K. the kind of records a broker is to keep; do you know what the rules are on that subject?

A. Yes.

Q. What is it?

A. The 1930 law required the customs broker to keep records on a form that the government had gotten out—you presented it here in evidence the other day—and if he made application within sixty days from the date of that act, that is the 1930 Tariff Act, he might be excused provided he was keeping other records that gives substantially the same information as is required in that form and when a broker makes application the collector——

Q. Is that in writing? Is that in writing, that application?

A. Oh, yes. The collector then sends that application to the special agent in charge of the treasury department in St. Paul, that is for our district, and he sends out an inspector to examine the broker's records and if he considers them adequate and they meet the requirements of the law he makes a report to—of that—to the collector and the collector writes the customs broker then and tells him that he is excused from keeping the record on that for but that he must not change his records to any other system without first giving notice to the collector.

Q. And the inspector, has he any right to pass judgment on the adequacy of those records?

[fol. 577] A. Well, he makes a report to the collector as to whether, in his opinion, the records comply with the requirements and give the information required on that sheet.

Q. And those records, as I understand it, have to be kept open for inspection for at least five years?

A. Not less than five years.

Q. Speaking now of the re-routing, it already appears that the routing of shipments was changed by the C. P. R. and, by the way, are you acquainted with and interested in

the C. P. R. and the Soo Line so as to be able to tell whether one is a subsidiary of the other or not?

A. I am.

Q. What is the fact?

A. The Canadian Pacific Railway owns 51 per cent of the Soo Line and controlled the Soo Line.

Q. Now there was, as has appeared from the testimony, a change in the routing of shipments of merchandise from Canada into the United States, as far as this district is concerned, from Portal to Noyes?

Q. In anticipation of that change was there any prepara*tion or improvement made at the station in Noyes?*

A. Yes, I think it would be in April or March the officials [fol. 578] came to Noyes and consulted with me and wanted to know what, in my opinion, what facilities they would be required to put in at Noyes in order to handle the increased business and they told me that the Portal business would be likely about twice as much as the business that had been moving through Noyes and then some little time later they put in tracks at a big expense and fixed up the yards and put a lot of money into it.

Q. These doings were publicly noticed?

A. Yes, the whole country knew that.

Q. And when that change became effective what influence did that have upon the business at Portal?

A. Well, it took practically all of the southbound business away. The Canadian Pacific they issued a new tariff routing the business through Noyes and they told me that the only business that would be going through Portal after July 1st would be shipments to local points in North and South Dakota.

Q. So that for all practical purposes no brokerage business was left at Portal when this change became effective?

A. Just odd shipments.

Q. And this change became effective on July 1, 1940; as far as the railroad is concerned shipments originating in British Columbia, say, would come, for the first time, through Noyes at what date?

A. We had occasional cars through Noyes before that [fol. 579] change from British Columbia but not many because the C. P. R. took a long haul where shipments come through Noyes instead of going east on their line, they lose some two or three hundred dollars in freight charges.

Q. Well, what I was trying to get at is this: suppose a shipment was started in Vancouver, British Columbia, say, on July 1st, and, effected by this change in routing, when would that car come through Noyes?

A. Well, I would say from four to six days after it leaves the coast.

Q. Four to six days?

A. Yes.

Q. And incidently, how many roads run through or enter Noyes?

A. Well, there are four roads runnnig there in and out—five roads.

Q. As supervisory agent are you in charge of the personnel in the depot for the two roads operating——

A. Supervisory charge but I have a chief clerk who is responsible for the handling of all the railroad work and I don't interfere with that or have any thing to do with it unless something out of the ordinary comes up and they ask me what to do in this case—I do no routine work, railroad work.

Q. I think I'll ask you to explain what happens at the port of entry, which in this instance is Emerson—I ask you to briefly refer to that——

[fol. 580] A. With reference to what—to the handling of papers or——

Q. Yes, is there any power under this law or the law affecting freight transportation in Canada authorizing any local agent to change the bills of lading or waybills or invoices from one broker to another?

A. No, absolutely no.

Q. If any such a thing is done over there, is that legal or illegal?

A. Illegal.

Q. Mr. McKenzie's name appears on one of the exhibits here—who was Mr. McKenzie?

A. Mr. McKenzie was the chief clerk for the Soo Line Railway and for the Great Northern Railway; he had been there for 25 years in that capacity.

Q. And he died?

A. He died on March 10th.

Q. This year?

A. Yes.

Q. 1941?

A. 1941.

Q. And did Mr. Phillips succeed him then or had he been chief clerk?

A. No, Mr. Phillips is cashier; he's not the chief clerk, he is the cashier and has been there for, I think, over—I think he's been there about 22 or 23 years.

Q. Do the records of the customs office disclose the fees or the duties exacted from the——

[fol. 581] A. Just the duty; the collector has nothing to do with fees. Fees are a matter of agreement between the broker and his client; there are no set fees.

. . . . . .

[fol. 582] Q. Yes; Mr. Jensen or Mr. Rime, I don't know who, has testified that the brokers business was hazardous, what have you to say as to that?

A. Well, I certainly think it's hazardous because they called on me for $76,000.00 two years ago.

Q. And will you kindly explain why it is hazardous and how the hazard arises?

A. Well, the broker's bond is held when you make an entry; you deposit it with the collector for what they call estimated duties—that is, they are not final and the collector has the right to suspend liquidation of entries—the collector of customs has the right or the government, you might say, has the right to suspend the liquidation of the entries as long as it likes; there is no limit to the time and those entries involving the $76,000.00 that the government claimed under the Dumping Act it was claimed that the shippers, importers had imported a lot of wheat flour and had sold that in the United States at a lower price than the foreign market value and under the Dumping Act they came back after 17 years, they suspended liquidation of those entries for 17 years and held my bond and they called on me for $76,000.00; they called on the broker over at Ranier for $125,000.00 or some such sum and those entries were unlaw-[fol. 583] ful and illegal from the very beginning but in spite of that the government insisted on that money being put up and when you file a process you must put up the money that the government asks for whether it be right or wrong, you must first hand them over the money before your case can be heard in the U. S. Customs Court and if you file a process and deposit the amount of money that is

claimed by the government, within 60 days from the date of entry, then that brings your case into the U. S. Customs Court; then you present your evidence there and that Court consists of the judge and United States Attorney and a court reporter; they start out from in New York and go all over a certain district and they take the evidence all back to New York and it is gone over by a board of three judges; the three render the decision usually from six to eight months after the hearing.

. . . . . .

[fols. 584-593] A. Yes. The customs laws are filled with technicalities and the only way that I can keep up on that is to read Court decisions, treasury decisions, we get them in pamphlet form each week and if you don't keep up on those you are just out in the cold.

. . . . . .

[fol. 594] Redirect examination.

. . . . . .

[fol. 595] Q. Al- right——

A. —they had the idea that the bill of lading took preference over the waybill, that is, if a broker's name was not shown on the waybill and was shown on the bill of lading, that the bill of lading took preference over the waybill; now, the waybill is made out from the original shipper's bill of lading, the shipping instructions, and the waybill is supposed to contain all of the information that the shipper has given when he turns the shipment over to the carrier and for that reason the waybill takes preference over any other bill of lading and it was disclosed at that meeting, both by Mr. Gilles and Mr. Plow, who were both there, and by the C. P. R. general superintendent of transportation, that they had been noting around the country too many fictitious bills of lading that were being used for custom purposes——

Q. Was that said in their presence?

A. Absolutely; and they decided the practice should be [fols. 596-601] stopped.

. . . . . .

[fol. 602-608] ANNIE KRAMER, called as a witness in behalf of the plaintiff, was duly sworn on oath and testified as follows:

Direct examination.

Mr. Eriksson:

Q. Your name is Annie Kramer?
A. Yes.
Q. And you have your home and live at Portal, North Dakota?
A. Yes.
Q. And you are a widow?
A. Yes.
Q. And your husband's name was Harry J. Kramer, was it?
A. Yes.
Q. He died in 1937, was it?
A. October 14, 1936.
Q. October 14, 1936?
A. Yes.
Q. Prior to his death he and Mr. Kramer had run the plaintiff's business?
A. Yes.

. . . . . .

[fol. 609] Q. Mrs. Kramer, I'm going to ask you a few questions on subjects that have already been covered but will try to ask you about things that haven't been cleared up before—you remember that the C. P. R. changed the [fols. 610-624] routing of shipments to Noyes away from Portal, you remember that?
A. Yes.
Q. When did you first hear about that proposed change?
A. On June 22, 1940.
Q. And how did you come to hear about that?
A. Mr. Jensen came and took me over to the train and he mentioned something about that it was rumors that the C. P. R. was going to transfer all their shipments through Noyes but he didn't think it would amount to anything.
Q. What if anything did you say?
A. Well, I told him I was going away and if anything came up that he should let me know and I gave him my

address or get in touch with Harry or Johnny—he was right there—if anything turned up that I should know about.

Q. And you went away then on the 22nd?

A. Yes.

Q. And when did you return?

A. I think it was around the 16th of July.

Q. And in the meantime had you heard anything from Mr. Jensen?

A. No.

* * * * * * *

[fol. 625] Mr. Eriksson: Alright. That's all, Mrs. Kramer. Plaintiff rests.

MOTION TO DISMISS

Mr. Murphy: Plaintiff having rested the defendants move that this action be dismissed on the following grounds: First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws of the State of Minnesota and is not entitled to sue in the state of Minnesota; second, on the ground that the evidence wholly fails to prove or sustain any of the allegations contained in the plaintiff's complaint; third, we move to dismiss as to the defendant Rine as there is absolutely no evidence in this case which in any way tends to prove or sustain any [fol. 626] allegations as to him, it appearing from the record that he never at any time had been affiliated with or employed by or connected with the plaintiff company and was under no obligation or duty of any kind with respect to the same. I want to make that motion for the record at this time.

The Court: The motion will be denied.

MOTION FOR LEAVE TO AMEND ANSWER

Mr. Murphy: Before we open I want to ask leave to amend the answer by adding thereto pleading the North Dakota statute and the proposed amendment being to paragraph six of the separate answer of the defendant Jensen. I'll say to the Court that at the time of the argument here on the temporary order the matter was called to counsel's

attention and he stated at that time, as I understand it, that he didn't rely upon the statute. We think the record should be cleared on that. I assume under the Minnesota practice it is a matter within the discretion of the Court to allow an amendment at any time before judgment.

* * * * * * *

[fol. 627] Mr. Murphy: Well, it doesn't change the issues in any way.

The Court: I don't think it will change the issues in any way. I think the issue involved here is whether the defendant has violated his duty as a fiduciary and not whether he has violated a contract. If, as the evidence may indicate, he has violated his duty as a fiduciary he will be held to an accounting regardless of any agreement to refrain from entering a competing business because as a fiduciary it is his duty to devote his efforts toward the good of the principal and the trust which he represents and I don't believe that the North Dakota statute will change that rule of law. I shall permit the amendment. Motion granted.

* * * * * * *

[fols. 628-660] NORMAN G. JENSEN, one of the defendants, called as a witness in behalf of the defendants, was duly sworn on oath and testified as follows:

* * * * * * *

[fol. 661] Cross-examination.

Mr. Eriksson:

Q. You just testified in response to Mr. Murphy's question, you told the court that you advised Mr. Mackay or stated to Mr. Mackay, on the evening of June 29, 1940, that you had not come to do business in the name of or for the Union Brokerage Company but had come as an individual?

A. That's right.

Q. If that is true will you please explain to the court why you left an order, exhibit Q, with Mr. MacKenzie directing him to transfer to you the Union Brokerage Company shipments?

A. I wanted to get those bills of lading so that we could take them back to the C. P. R. to ascertain which of the

brokers transacting business at Noyes was intended to clear the shipments.

[fols. 662-670] (Plaintiff's Exhibit KKK marked for identification.)

Q. Is it not true that before June 29, 1940, and ever since that time, that the regulation of the customs service has been and is that the consignee, the broker consignee named by the carrier on the bill of lading is the one who has the sole right to enter merchandise and that this authority cannot be delegated to anyone else?

A. I don't understand your—it cannot be delegated without the authority of the shipper.

Q. I'll show you Plaintiff's Exhibit KKK and ask you to read that and then tell the court if that isn't a correct statement of the rule that has been in force since before June 29, 1940?

A. The statement is no doubt correct.

Mr. Eriksson: We offer exhibit KKK.

Mr. Murphy: No objection.

The Court: It may be received.

Mr. Eriksson:

. . . . . .

[fols. 671-690] Q. Now, another question I'd like to ask you before we proceed with the remainder of the direct examination: it is true, is it not, that on June 29, 1940, or before, you had made up your mind to follow the business diverted from Portal to Noyes and to operate the business in your own name at Noyes, isn't that right?

A. I had made up my mind to open up business in my own name at Noyes.

Q. But you chose not to resign at that time?

A. Well, in all events, I did not resign at that time.

Q. And another thing I'd like to have you clear up for us, you will concede, will you not, that there can't be two original bills of lading out at the same time regarding one shipment?

A. There can't be two original bills of lading out at the same time. That is correct.

. . . . . .

[fol. 691] COLLOQUY

(Attorneys confer with the court.)

Mr. Eriksson: Your Honor, I won't question Mr. Murphy's nor Mr. Palda's statement as to what the North Dakota law is. They undoubtedly know it and their word is as good as anybody elses and so, subject to the objection that we have already made that it is inadmissible under the pleadings as they were and that the amendment is not seasonably made and it is immaterial and irrelevant to any issue in this case, I am certainly willing and I think associate counsel is willing to agree that whatever Mr. Murphy [fol. 692] says the North Dakota law is is the law in North Dakota on that subject.

Mr. Murphy: Well, may we stipulate then that at the time the contract or memorandum, Exhibit C, was entered into, and at this time, the laws of the State of North Dakota provided as follows: "Section 5928, Compiled Laws of the State of North Dakota for the year 1913: In restraint of business void. Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void. Section 5929, Compiled laws of the State of North Dakota for the year 1913: Goodwill excepted. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified count', city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein. Section 5930, Compiled Laws of the State of North Dakota for the year 1913: Partners excepted. Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

Mr. Eriksson: Is that all, Mr. Murphy?

Mr. Murphy: Yes.

Mr. Eriksson: We agree on the assurance of Mr. Mur- [fol. 693] phy that that is a statutory law of the State of North Dakota but we make that agreement subject to the exception and the objection that we first noted.

The Court: Your objection isn't to the fact that that is

the law but to the action on the part of the Court in permitting the answer to be amended?

Mr. Eriksson: Yes.

The Court: It may be so understood.

Mr. Murphy: We rest.

(Afternoon recess.)

Mr. Eriksson: May it please the court, the plaintiff rests and I understand that Mr. Palda and Mr. James Eriksson have had some conferences about a subject that they had better present——

Mr. Murphy: Before you do that, plaintiff having rested, I want to renew the motion made at the close of plaintiff's case.

The Court: Motion denied.

(Attorneys confer with the court.)

. . . . . .

[fol. 694] In District Court of Kittson County

Stipulation Settling Case

It is hereby stipulated and agreed that the foregoing proposed case consisting of 522 pages of typewritten matter and 92 exhibits, together with the depositions of Ted Solheim, J. S. Westlake and Chas. L. Hawley, taken at Minot, North Dakota, before Anna Jones, a notary public in and for the county of Ward, state of North Dakota, on December 5, 1941, and the deposition of H. M. Westrum taken at Bowbells, North Dakota, before Earl Walter, a notary public in and for the county of Burke, state of North Dakota, on November 12, 1941, and finally concluded on December 2, 1941, is a true, complete and accurate report of the testimony of each and all of the witnesses who were sworn and testified at the trial of said cause, and all the evidence received and rejected by the court, and all rulings of the court upon the admission and rejection of evidence and of all rulings and directions of the court of whatever nature and all exceptions taken and entered to any and all [fol. 695] of the rulings of the court and is a true, complete and accurate report of all proceedings, actions and things of whatever nature had and done on the trial of said cause,

and that the same may be settled and allowed by the court as the settled case herein.

Dated June 30, 1942.

Francis Murphy, Palda & Palda, A. D. Bornemann, Attorneys for Defendants. Leonard Eriksson, For Himself and Associates, Attorneys for Plaintiff.

IN DISTRICT COURT OF KITTSON COUNTY

ORDER SETTLING CASE

Pursuant to a stipulation existing between the parties hereto,

I hereby certify that the within and foregoing case, consisting of 522 pages of typewritten matter and 92 exhibits, together with the depositions of Ted Solheim, J. S. Westlake and Chas. L. Hawley, taken at Minot, North Dakota, before Anna Jones, a notary public in and for the county of Ward, state of North Dakota, on December 5, 1941, and the deposition of H. M. Westrum taken at Bowbells, North Dakota, before Earl Walter, a notary public in and for the county of Burke, state of North Dakota, on November 12, [fol. 696] 1941, and finally concluded on December 2, 1941, has been examined by me and found conformable to the truth and to contain all of the testimony and evidence offered or introduced on the trial of this cause and also all objections, rulings, exceptions, orders and all other proceedings of such trial, and I hereby settle and allow the same as the settled case herein.

Dated July 28, 1942.

Oscar R. Knutson, Judge of The District Court.

IN DISTRICT COURT OF KITTSON COUNTY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled action being upon the calendar for the November, 1941, regular term of said court, came on for trial before the undersigned, one of the judges thereof,

without a jury, by consent of the parties, on the 8th day of December, 1941, at the courtroom in the courthouse, in the village of Hallock, in the county of Kittson and state of Minnesota. Leonard Eriksson, Esq., and James S. Eriksson, Esq., of Fergus Falls, Minnesota, appeared as attorneys for the plaintiff, and Francis Murphy, Esq., of Fargo, North Dakota; Robert W. Palda, Esq., of Minot, North Dakota, and A. D. Bornemann, Esq., of Hallock, Minnesota, appeared for and in behalf of the defendants.

[fol. 697] The court having heard and considered the evidence adduced by and in behalf of the respective parties, having heard the arguments of counsel and read and considered the written briefs submitted in behalf of the respective parties involved, and being fully advised in the premises, makes the following findings of fact

1

That the plaintiff was during all the times herein mentioned and now is, a corporation duly organized, created and existing under and by virtue of the laws of the state of North Dakota having its principal office and place of business at Portal, in the county of Burke and state of North Dakota.

2

That plaintiff has been during all the times herein stated, and now is, engaged in the business of a customhouse broker.

3

That under the Tariff Act of 1930 of the United States, Section 641 as amended (USAC Title 19, Section 1641) the secretary of the treasury of the United States is authorized to license citizens of the United States of good moral character, and corporations, associations and partnerships as customhouse brokers, and to prescribe rules and regulations governing the licensing thereof; that a corporation so licensed is required by said act to have at least two of its officers individually licensed before the cor-

[fol. 698] poration may receive a license to so operate.

4

That pursuant to said act of congress the secretary of the treasury has promulgated rules and regulations governing

the licensing of customhouse brokers. (Plaintiff's Exhibit A.)

5

That the principal function of customhouse brokers, as far as herein concerned, is that of making entry of shipments of goods entering the United States from the Dominion of Canada, paying the customs duty imposed on such shipments, and clearing the same so that they may continue on their course to their ultimate destination with the least possible loss of time; that in making entry shipments are consigned on bills of lading by the shipper to the customhouse broker chosen by such shipper; that a copy of such bill of lading is thereafter delivered to the broker by the carrier or mailed directly to him by the shipper; that upon receipt of such bill of lading by the broker the same is presented to the collector of customs and thereupon the duty due the United States is determined by the collector of customs and paid by the broker, whereupon the shipment is cleared and permitted to proceed to its ultimate destination and consignee; that the customhouse broker, so acting, is considered, for the purpose of making such entry, [fol. 699] the actual consignee and acts as the agent of the shipper in making such entry; that in clearing said shipments he aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States; that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the Union States and the Dominion of Canada.

6

That as compensation for their services customhouse brokers are paid a fee by the shipper or the ultimate consignee, the amount of which is determined by an agreement between them; that they receive no compensation of any kind whatsoever from the United States.

7

That the president of the United States, by act of congress is authorized to establish customs collection districts and to re-arrange the same as the exigencies of the service may require; that District Number 34, known as the Dis-

trict of Dakota, includes all of the states of North Dakota and South Dakota and the county of Kittson, in the state of Minnesota, lying north of 46th degree of north latitude. (Vol. 6-A, FCA, Title 19, Section 2.)

8

[fol. 700] That Portal, North Dakota, Noyes, Minnesota and Northgate, North Dakota are all designated as ports of entry in District Number 34.

9

That licenses are issued to customhouse brokers for one customs collection district only and may be used to clear shipments at any port of entry within the district for which so issued.

10

That plaintiff was, during all the times herein mentioned, and now is, a duly licensed customhouse broker for District Number 34, and had for many years prior to September 8, 1938, conducted a customhouse brokerage business at Portal, in the state of North Dakota, and has continued to conduct the same after said date, there and elsewhere, as hereinafter stated.

11

That prior to February 15, 1937, one Carl M. Anderson and one H. J. Kramer were the principal stockholders of plaintiff corporation and the persons in actual control of its affairs; that said H. J. Kramer died October 14, 1936, and that his widow, Annie Kramer, succeeded to ownership of his stock in said corporation; that said Carl M. Anderson died on February 17, 1937, and his widow, Nan W. Anderson, succeeded to his stock in said corporation; that Harry O. Kramer, a son of said H. J. Kramer and [fol. 701] Annie Kramer, was then, and continued to be, the owner of a qualifying share of stock in said corporation and acted as its secretary substantially all the time herein mentioned.

12

That upon the death of said H. J. Kramer, one Minton V. Carlson was permitted to purchase stock in said corporation and became a director and officer thereof; that

after the death of said Carl M. Anderson said Minton V. Carlson and Harry O. Kramer continued to operate said business until the 8th day of September, 1938.

13

That prior to 1937 the defendant, Norman G. Jensen, was superintendent of schools at Ross, North Dakota; that he had no experience as a customhouse broker; that in the month of March, 1937, said defendant was licensed as a customhouse broker for District Number 34, and shortly thereafter moved to Portal, North Dakota, where he established a customhouse brokerage business in competition with plaintiff; that he also established and conducted a small customhouse brokerage business at the port of entry of Northgate, North Dakota, which is in District Number 34, and carried on a limited insurance and finance business, which was in no way related to the customhouse brokerage business.

[fol. 702] 14

That on the 8th day of September, 1938, said defendant had acquired approximately fifty regular customers for whom he was acting as customhouse broker at Portal, North Dakota; that on that date plaintiff had approximately one hundred fifty regular customers that it was serving as customhouse broker at Portal, North Dakota; that on said date plaintiff and said defendant, Norman G. Jensen, entered into an agreement under the terms of which said defendant transferred all his brokerage business at Portal, North Dakota, to plaintiff, in consideration for which he received twenty-five shares of stock in plaintiff corporation, fully paid, having a par value of twenty-five hundred dollars, became its president and treasurer and was placed in complete charge of its affairs; that the terms of said agreement were embodied in a written instrument (Plaintiff's Exhibit C), which was signed and delivered by said defendant to plaintiff and which agreement reads as follows:

> "I, Norman Gilbert Jensen, in consideration of receiving twenty five (25) shares of the capital stock of the Union Brokerage Corporation of Portal, North Dakota, do hereby agree to turn over to the Union Brokerage Corporation all my right, title and interest in the

custom brokerage business now conducted by me or under my name. I do hereby agree that all brokerage [fol. 703] business in the future will be conducted under the name of and for the sole benefit of the Union Brokerage Company, a corporation of North Dakota, that I will not at any time engage privately or otherwise in any business that would compete with the general business and purpose of the Union Brokerage Company; I do hereby further agree not to hold or acquire any interest whatsoever, stock or otherwise in any other Broker or Brokerage company, which would compete with the Union Brokerage Company.

I do further agree to use my very best efforts to conduct the Union Brokerage Business for the benefit of the Corporation, its officers, directors and stockholders; to give the daily conduct of its business my full time, best efforts and energy, and to operate and conduct said business in full compliance with the minutes and by-laws of the Union Brokerage Company.

It is understood that in consideration of the above stock being issued to me and my wife as joint tenants, said stock is all fully paid. I will further give the officers and directors my full cooperation at all times, and will conduct said business with the full faith herein placed in me and will not at any time violate or take advantage of the fiduciary relationship which I now oc- [fol. 704] cupy by reason of my office in said Corporation.

Witnessed this 6th day of September, 1938.

M. V. Carlson — Norman G. Jensen

H. O. Kramer — "

that at the time of entering into said agreement it was agreed and understood by and between said defendant and the other stockholders of plaintiff that said defendant was to be permitted to continue his brokerage business at Northgate, North Dakota, as his own individual business; that the statutes of the state of North Dakota provide:

"Section 5928, Compiled Laws of the State of North Dakota for the year 1913:

In Restraint Of Business Void. Every contract by which any one is restrained from exercising a lawful

profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

Section 5929, Compiled Laws of the State of North Dakota for the year 1913:

Good Will Excepted. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein.

Partners Excepted: Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

15

That at the same meeting held on September 8, 1938, Minton V. Carlson resigned as a director and officer of said corporation, surrendered all his stock therein and for all practical purposes completely served his connection with said corporation; that thenceforth the stockholders of said corporation were, and now are, Norman G. Jensen, as the owner of 25 shares of stock; Nan W. Anderson, as the owner of 37½ shares of stock, and Annie Kramer, as the owner of 37½ shares of stock; that Harry O. Kramer appears to have been the nominal owner of a share of stock in said corporation for the purpose of qualifying him to act as a director and officer thereof.

16

That the capital stock of plaintiff was carried on its books at a par value of ten thousand ($10,000.00) dollars; that of this amount the good will of the company constituted the greatest asset, and was carried on its books as of September [fol. 706] 30, 1938, at the sum of eight thousand one hundred thirty-seven and 52/100 dollars ($8,137.52), and continued to be carried on its books at a sum approximating eight to nine thousand dollars; that the good will of said company constituted almost entirely of the contacts it had made with shippers in Canada, and elsewhere, and the

business it had done for such customers as a customhouse broker over a period of years.

17

That the position of the defendant, Norman G. Jensen, as an officer and the manager of plaintiff, placed him in intimate contact with the customers of plaintiff and made available to him all the records of plaintiff, including the names and location of the customers for whom plaintiff had acted as customhouse broker, and the nature of the business done by each of these customers.

18

That up until the middle of the year 1940 plaintiff had enjoyed a very lucrative business at Portal, North Dakota; that the net profits for the year 1939 amounted to the sum of seven thousand two hundred ninety-seven and 83/100 dollars ($7,297.83), which, after putting aside a small amount for working reserve, was divided among the stockholders in the same proportion as they held stock in said corporation; that in addition to his share of the net profits of the company the defendant Jensen received a salary of [fol. 707] two hundred fifty ($250.00) dollars per month for his services in managing and operating said company, which salary continued until the latter part of 1940 when, for a brief period of time, he agreed to accept one hundred twenty-five ($125.00) dollars per month as his salary on account of the decrease in the income of plaintiff corporation.

19

That neither Nan W. Anderson or Annie Kramer had any personal knowledge of the customhouse brokerage business and both of them were incapable of operating the same; that after the defendant Jensen became a stockholder, and the active manager of said company, said Nan W. Anderson and Annie Kramer placed their complete confidence and trust in his management of the affairs of the company and completely relied upon his integrity in carrying on its affairs for the mutual benefit of himself and the other stockholders thereof.

20

That only one railway line enters the port of Portal, North Dakota, namely the Canadian Pacific Railway (here-

after referred to as the C. P. R.) which connects with the Minneapolis, St. Paul and Soo Ste. Marie Railway (hereafter referred to as the Soo Line) at the border.

21

[fol. 708] That the Canadian Pacific Railway Company controlled the routing of shipments in the Dominion of Canada; that during the early part of 1938 said C. P. R. decided to re-route all shipments then going through Portal, North Dakota, to Noyes, Minnesota, in order that the C. P. R. might receive a greater share of the revenue from freight by hauling it a longer distance over its lines before entering the United States; that the Soo Line, as well as the lines of the Great Northern Railway Company connect with the C. P. R. at Noyes; that such re-routing affected all shipments going through Portal, North Dakota, excepting only those consigned to points in North Dakota and South Dakota; that said re-routing affected 90 to 95 percent of the business done by plaintiff at Portal, North Dakota.

22

That the defendant Jensen was informed of such proposed re-routing on or about June 20, 1940, while acting as president and treasurer of plaintiff and its manager; that plaintiff could follow said business to Noyes and its license was operative thereat; that said defendant, well knowing that the other stockholders of plaintiff company placed full reliance and confidence in him, failed and neglected to inform them of such proposed re-routing and instead of so doing secretly planned to follow said business [fol. 709] to Noyes, Minnesota, and obtain the same for his own personal use and benefit; that in order to carry out said purpose he engaged the services of the defendant, Curtis M. Rime, who was then teaching school in Portal, North Dakota; that said Rime had no experience in the customhouse brokerage business; that in order to qualify him to carry on said business the defendant Jensen took him into plaintiff's office at Portal, North Dakota, and there trained him in the work and duties of such customhouse broker.

23

That the re-routing of said business became effective on July 1, 1940; that on said date the defendant Jensen, while

acting as the managing officer of plaintiff, established a customhouse brokerage business at Noyes, Minnesota, in his own name, executed a power of attorney to the defendant Rime and placed him in charge of said business, while he, the defendant Jensen, continued in charge of the business at Portal; that none of said facts or the information he had acquired were conveyed to the other stockholders of plaintiff.

24

That after the re-routing of said business many of the shippers with whom plaintiff had formerly done business at Portal continued to consign their shipments to plaintiff at Noyes, Minnesota; that said shipments could not be cleared [fol. 710] at Noyes, Minnesota, by the defendant Jensen in his own name without causing a change to be made in the bill of lading; that in order to enable him to appropriate said business to his own use, the defendant Jensen had procured a rubber stamp containing thereon his own name, which he left at the depot at Emerson, Manitoba, which is the port of exit of shipments entering the United States at the port of Noyes; that the defendant Jensen then prepared and left with the agent in charge of the depot at Noyes, Minnesota, instructions, in writing, reading as follows:

"Mr. MacKenzie June 29, 1940
Noyes, Minn.

SIR:

Kindly deliver to Mr. Curtis Rime all bills of lading and invoices for shipments to be cleared through customs by Norman G. Jensen or Union Brokerage Co.

Sincerely
Norman G. Jensen"

that pursuant to said instructions, and acting upon the belief that the defendant Jensen was acting for plaintiff as its officer, bills of lading consigned to plaintiff were delivered to the defendant Rime; that he thereupon took said bills of lading to the depot at Emerson, Manitoba, stamped the name of Norman G. Jensen over the name of plaintiff and altered the same so as to show Jensen's name as broker [fol. 711] consignee and thereafter cleared said shipments in Jensen's name at Noyes, Minnesota.

25

That the other stockholders of plaintiff, excluding the defendant Jensen, first learned that said business had been re-routed to Noyes, and first learned that Jensen had followed said business to Noyes, during the month of July, 1940; that when the defendant Jensen was confronted with said facts by the attorney for plaintiff and the other stockholders thereof, he stated and represented to them that said business at Noyes was unprofitable and that it barely paid the expenses of said office and would in all probability be discontinued and further stated and represented to them that plaintiff could not operate at Noyes, Minnesota, for the reason that it had formerly entered into an agreement, in writing, with one William F. Mackay, a customhouse broker then operating at Noyes, Minnesota, providing that plaintiff would not establish a customhouse brokerage business at Noyes and that in consideration thereof said Mackay would refrain from entering into a competing business at Portal, and further represented that he, said defendant Jensen, had read or seen such statement in writing; that said statements and representations so made by the defendant Jensen were false, and said defendant well knew [fol. 712] that the same were false, and that the said statements and representations were falsely and fraudulently made for the purpose of enabling said defendant Jensen to appropriate to his own use the business of plaintiff coming to the port at Noyes, Minnesota, and for the purpose of inducing plaintiff to believe that it could not operate at Noyes, Minnesota.

26

That plaintiff learned that said statements, so made by the defendant Jensen, were false, during the month of September, 1940; that thereupon the defendant Jensen was asked to resign from plaintiff company as an officer and the manager thereof and a demand was made upon him for a complete accounting of the business; that on the 7th day of November, 1940, defendant did resign his position as an officer and director of plaintiff; that up until that time he had continued to receive his salary as such officer and director of plaintiff company; that on the date of his resignation all the cash assets of plaintiff, including the working reserve of the company, had been exhausted in the payment of said defendant's salary and other operating expenses of said business at Portal, North Dakota.

27

That after learning of the re-routing of said business the stockholders of plaintiff sent the defendant Jensen to the [fol. 713] west coast, and elsewhere, to contact shippers for whom plaintiff had acted as broker in an effort to procure their assistance in having the business returned to Portal, North Dakota; that said defendant did make trips to various points in western Canada, and elsewhere, and did contact some shippers but without any success.

28

That in determining the custom duty to be paid on a shipment of goods, the duty imposed is frequently in excess of, or less than, the actual duty due; that in such cases the customhouse broker, as part of the services rendered by him, seeks to recover the excess from the United States government for his customers, and is liable, on the other hand, for any deficiency; that in order to complete said business it is necessary, and customhouse brokers are required by law, to keep complete and adequate records; that at the time of his resignation, on November 7, 1940, the defendant Jensen informed the other stockholders of plaintiff that most of the files, correspondence, and records of plaintiff had been lost; that said records were kept in the office of plaintiff at Portal, North Dakota, and were in the care and custody of said defendant; that no information concerning the loss of said records had been conveyed to any of the stockholders of plaintiff prior to the time of the meeting thereof in Portal on November 7, 1940.

[fol. 714]

29

That after his resignation as an officer of plaintiff the defendant Jensen has continued to operate said business at Noyes, Minnesota; that a large part of the business so received by him is business done for customers for whom plaintiff had acted as broker prior to the establishment of said business at Noyes; that said defendant has informed many of such customers that plaintiff was not operating at Noyes and was, and has been, able by his wrongful and fraudulent conduct, and his position as an officer of plaintiff, to acquire in his own name the business which was and is rightfully and in equity and good conscience, that of the plaintiff.

That between the 1st day of July, 1940, and the 1st day of December, 1941, said business so conducted at Noyes, Minnesota, has earned the following amounts:

1940		
July	$ 944.67	
August	1,377.75	
September	756.80	
October	1,235.60	
November	1,619.75	
December	929.05	
1941		
January	$ 895.00	
February	598.25	
March	587.25	
[fol. 715] April	556.50	
May	968.50	
June	1,141.50	
July	1,421.25	
August	1,529.50	
September	1,102.00	
October	2,213.30	
November	1,662.20	
Total		$19,538.87

That the deductible expenses for said period of time are:

Salaries		
Curtis M. Rime	$2,480.00	
Carlson	898.21	
McIlraith	302.00	
Rustad	338.60	
H. R. Jensen	197.50	
V. Jensen	60.00	
Wegener	358.90	
Social Security	46.35	
Check exchange and post office supplies	839.98	
Telephone & Telegraph	398.26	
Misc. expense	1,936.13	
Travel	1,951.50	
Rent and Light	113.00	
Total Deductible Expense		$9,920.43
Net Profit		$9,618.44

[fol. 716] 31

That in addition to the salaries paid to the defendant, Curtis M. Rime, he has been paid various sums of money from time to time designated as a bonus; that said payments were in the nature of dividends paid out of the earnings of the business; that the sum of one hundred fifty ($150.00) dollars per month paid said defendant as a salary, was a fair and adequate compensation for the services rendered by him and that the additional amounts paid, totaling the sum of one thousand eight hundred seventy-one and 66/100 ($1,871.66) dollars, should be returned to plaintiff; that said defendant Rime knew that said business, in truth and in fact, belonged to plaintiff and that he wrongfully aided and abetted the defendant Jensen in appropriating the same to his own use.

32

That subsequent to the resignation of the defendant Jensen plaintiff has commenced to do business at Noyes, Minnesota, which business is handled for plaintiff by William F. Mackay, acting under a power of attorney, and by others acting in a similar capacity.

33

That the defendant Jensen, while establishing said business at Noyes, was acting in a fiduciary capacity for plaintiff; that he owed it a duty of disclosing the information acquired while so acting, affecting, or about to seriously [fol. 717] affect, its business; that he wrongfully converted said business to his own use; that said business and the income and profits thereof in equity and good conscience belonged to plaintiff and that the defendants held and operated the same in trust for the plaintiff during the times herein stated.

34

That all rebates, commissions, fees and other income earned or to be earned or paid, out of said business up to November 30, 1941, belong to plaintiff and are held for plaintiff's use and benefit in trust by the defendants.

35

As to plaintiff's second cause of action I find that there is no evidence to sustain the same.

Conclusions of Law

As conclusions of law from the foregoing findings of fact, it is adjudged, ordered and decreed:

1

That plaintiff have and recover of the defendant, Norman G. Jensen, the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars, with interest thereon from November 30, 1941, at the rate of six (6%) percent per annum.

2

That plaintiff have and recover of the defendant, Curtis M. Rime, the sum of one thousaid eight hundred seventy-five and 66/100 ($1,871.66) dollars, with interest thereon at [fol. 718] the rate of six (6%) percent per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant, Norman G. Jensen.

3

That the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for under payments or money due or to become due the United States government on account of said business.

4

That plaintiff's second cause of action be dismissed.

Let judgment be entered accordingly.

Dated March 27, 1942.

Oscar R. Knutson, Judge of the District Court.

[fol. 719] It is ordered that a stay of thirty (30) days from the date of the filing hereof be granted.

Oscar R. Knutson, Judge of the District Court.

MEMORANDUM

That the defendant Jensen acted as a fiduciary and occupied a position of trust and confidence can hardly be open to doubt. That he did not act in good faith in establishing the business at Noyes in his own name is equally clear. It is also clear that the business he did at Noyes was substantially all with plaintiff's customers.

The convenient loss (or destruction) of plaintiff's books and records at the time the defendant resigned his position has made it increasingly difficult for plaintiff to establish the facts but the evidence showing a breach of trust is hardly open to dispute. Fair play and good faith would have required at least a disclosure of the facts, about to so vitally affect the very existence of plaintiff, to the other stockholders in order that they might take adequate measures to follow the business of plaintiff to Noyes if they saw fit. That the business followed plaintiff is evident from the fact that it became necessary for the defendants to alter the bills of lading which came consigned to plaintiff before they could clear the shipments covered by such bills of lading. All plaintiff had to do to continue its busi- [fol. 720] ness was to put someone in charge of it at Noyes to handle it as it came.

It seems clear to me that plaintiff is entitled to the earnings of the business at Noyes up until the time that Jensen resigned as an officer of plaintiff. Whether plaintiff is entitled to the profits of the business after that time is more difficult to determine. However, it is clear that he continued to convert plaintiff's business to his own use by wrongfully altering bills of lading consigned to plaintiff long after he resigned as an officer of the company. It seems to me that the only equitable disposition of the matter is to require the defendant Jensen to account for all the profits of the business shown by the evidence to have been earned. He is still the owner of 25% of the stock of plaintiff corporation. Whether the actions of the other stockholders since his resignation, in his absence, are legal or not is not involved in this action.

Defendants contend that Plaintiff's Exhibit C is void under the laws of the state of North Dakota. Whether the agreement could be specifically enforced or not need not be determined. Even if it is void under the laws of the state of North Dakota, if specific performance were sought, it does not alter the ordinary rules of equity requiring a fiduciary to act toward his principal in good faith. The agreement, whether valid or not, does furnish some evidence of the fact that defendant, while drawing his salary, owed his full time and ability to plaintiff. That he has [fol. 721] violated that duty, as well as others, is patent from the evidence.

In passing it might be said that if the demands of plaintiff's then attorney and the other stockholders had not been so unreasonable when the activities of the defendants, of which they now complain, were discovered, this litigation might have been avoided. No good reason has been suggested why Jensen should then have been, or now be, deprived of his stock in plaintiff company, in addition to accounting for the profits of this business. His stock was fully paid for. He turned in his own business as part payment. He should be permitted to retain his stock.

(Filed March 28, 1942, C. A. Erickson, clerk, District Court, Kittson County, Minn.)

In District Court of Kittson County

Judgment and Decree—Filed August 20, 1942

The above entitled action having been on the calendar of causes for trial, at the November, 1941, regular term of the above named court, came on for trial by the court without a jury on the 8th day of December, 1941, at the court room in the courthouse in the village of Hallock, Kittson County, Minnesota, the Hon. Oscar R. Knutson, district judge, presiding.

Leonard Eriksson, Esq., and James S. Eriksson, Esq., of Fergus Falls, Minnesota, appeared as attorneys for the [fol. 722] plaintiff and Francis Murphy, Esq., of Fargo, North Dakota, and Robert W. Palda, Esq., of Minot, North Dakota, and A. D. Bornemann, Esq., of Hallock, Minnesota, appeared for and on behalf of the defendants.

After having heard and considered the evidence adduced by and in behalf of the respective parties, and after having heard and considered the arguments of counsel, oral and written, and being fully advised in the premises, the court made and filed its findings of fact, conclusions of law and order for judgment.

Now, pursuant to said order for judgment, and on motion of Leonard Eriksson, attorney for the plaintiff,

It is ordered, adjudged and decreed, that plaintiff have and recover of the defendant Norman G. Jensen the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars with interest thereon from November 30, 1941, at the rate of six (6%) percent per annum, amounting to the sum of four hundred sixteen and 78/100 ($416.78) dollars and costs and disbursements taxed and allowed herein amounting to the sum of $289.58, making a total amount of $10,324.80.

It is further ordered, adjudged and decreed, that the plaintiff have and recover of the defendant, Curtis M. Rime, the sum of one thousand eight hundred seventy-one and 66/100 ($1,871.66) dollars with interest thereon at the rate [fol. 723] of six (6) percent per annum from and after the 30th day of November, 1941, amounting to the sum of eighty-one and 12/100 ($81.12) dollars and costs and disbursements taxed and allowed herein amounting to the sum of $289.58, making a total amount of $2,242.36; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant Norman G. Jensen.

It is further ordered, adjudged and decreed, that the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of the plaintiff for any amount that is due or may become due for underpayments or money due or to become due the United States government on account of said business.

[fol. 724] It is further ordered, adjudged and decreed, that plaintiff's second cause of action be dismissed.

Dated August 20, 1942.

By the Court, C. A. Erickson, Clerk of the District Court.

[File endorsement omitted.]

In District Court of Kittson County

Notice of Appeal to Supreme Court—Filed August 21, 1942

To Leonard Eriksson, Esq., and James S. Eriksson, Esq., attorneys for the above named plaintiff, and to C. A. Erikson, clerk of said District Court:

Please take notice, that the above named Norman G. Jensen and Curtis M. Rime, defendants, appeal to the Supreme Court of the state of Minnesota, from the judgment and the whole thereof, of the said District Court entered herein, on the 20th day of August, 1942.

Dated this 20th day of August, 1942.

Francis Murphy, Fargo, North Dakota; Robert W. Palda, Minot, North Dakota; A. D. Bornemann, Hallock, Minnesota, Attorneys for Defendants.

[fols. 725-726] Due and personal service of the within and attached notice of appeal is hereby admitted at Hallock, Minnesota, this 21st day of August, 1942.

C. A. Erickson, Clerk of the District Court.

[File endorsement omitted.]

(Bond on appeal duly served and filed on August 21st, 1942.)

[fol. 727] Endorsed: Filed May 14, 1943. Grace Kaercher Davis, Clerk Minnesota Supreme Court

No. 103

Kittson County

Youngdahl, J.

33388

UNION BROKERAGE CO., Respondent,

v.

NORMAN G. JENSEN, et al., Appellants

SYLLABUS

Activities of foreign corporation as a customhouse broker, which were local and intrastate in character and had no substantial relation to interstate commerce, *held*, under facts summarized in opinion, to render corporation amenable to Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20), requiring a certificate of authority before bringing an action in the courts of Minnesota.

Reversed.

OPINION

YOUNGDAHL, Justice.

Plaintiff, a North Dakota corporation, brought this action to recover from defendants certain profits resulting from their operation of a customhouse brokerage business at the port of Noyes, Minnesota. The action was tried to the court, and defendants appeal from an adverse judgment for $12,567.16 entered pursuant to findings and order for judgment.

On September 6, 1938, and for some time prior thereto, plaintiff and defendant Jensen, both duly licensed customhouse brokers, conducted their separate brokerage busi- [fol. 728] nesses at the port of Portal, North Dakota. On that date a written agreement was entered into between them which provided, among other things, that Jensen, in consideration of receiving 25 shares of the capital stock of plaintiff at a par value of $100 per share, would turn over to plaintiff his personal brokerage business at Portal and

thereafter refrain from engaging in any competing brokerage business, and that he would generally devote his time, effort, and ability to the best interests of plaintiff, with due regard for his fiduciary relationship thereto. Jensen was elected president and treasurer of plaintiff at a salary of $250 per month. Because of his knowledge of the technical rules and regulations governing the customhouse brokerage business and his practical experience therewith, Jensen assumed management and control of plaintiff. His close, personal supervision of this business is further indicated by the fact that the remaining shares of the capital stock in plaintiff, with the exception of one share nominally held by Harry O. Kramer to qualify him as a member of the board of directors, were held by Mrs. Annie Kramer and Mrs. Nan Anderson, both of whom were unfamiliar with the business and who, through lack of experience and knowledge thereof, were incapable of directing corporate affairs.

Plaintiff and Jensen were each licensed as customhouse brokers pursuant to the provisions of the federal Tariff Act of 1930, § 641, as amended, 19 U. S. C. A. § 1641, and by virtue of these licenses were privileged to conduct the business of customhouse brokers within the confines of a designated geographic area known as District No. 34, comprising the states of North Dakota, South Dakota, and Kittson county, Minnesota, in which latter county is located the [fol. 729] town of Noyes. Section 641(a) of the Tariff Act (19 U. S. C. A., § 1641[a]) provides, in substance, that no license shall be granted to any corporation, association, or partnership unless licenses as customhouse brokers have been issued to at least two members of the partnership or two of the officers of the corporation or association, and such licenses are in force. Jensen's license to act as a customhouse broker became one of the two licenses necessary to carry on plaintiff's business. The other license was issued to Harry O. Kramer, son of stockholder Mrs. Kramer, who during substantially all the time here pertinent acted as secretary of plaintiff.

The major portion of the tonnage passing through the port of Portal, North Dakota, from Canada into the United States, was by rail. The Canadian Pacific Railway (hereinafter referred to as the C. P. R.) had a terminal at Portal, as did the Minneapolis, St. Paul & Sault Ste. Marie Railway (hereinafter referred to as the Soo line), thereby effecting a junction of the two lines at that point over which continu-

ous rail shipments might be made. Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regulations of customs law, as well as sufficient information to enable the [fol. 730] broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused.

About July 1, 1940, the C. P. R. gave notice that thereafter shipments of merchandise from Canada into the United States through the port of Portal, North Dakota, would be rerouted via and cleared at the port of Noyes, Minnesota. By this change, the railroad apparently was able to profit from a longer freight haul across the state of North Dakota. Obviously, unless plaintiff could follow the business to Noyes, it was about to suffer serious loss. Noyes, Minnesota, is located within District No. 34, and the brokerage licenses of plaintiff and Jensen, respectively, covered the entire area. Although the evidence is somewhat conflicting as to plaintiff's knowledge of this contemplated change, it does appear, however, that Jensen, without fully advising the officers and board of directors of plaintiff, opened up an office at Noyes with the aid and assistance of one Rime, his codefendant herein, to whom he gave a power of attorney, and proceeded to conduct the new business as his own solely for personal profit and gain.

Following the rerouting of shipments through the port of Noyes rather than Portal, North Dakota, many of plain-

tiff's Canadian clients continued to consign merchandise to plaintiff for clearance through the port of Noyes and to [fol. 731] designate plaintiff's name specifically as consignee in their bills of lading. Apparently Jensen conceived the idea that he might avail himself of this business on his personal account, provided he could successfully change or have changed the bills of lading so as to designate himself, personally, as broker consignee. He accomplished this by a letter addressed to the chief clerk of the Soo Line at Noyes under date of June 29, 1940, in which he requested the clerk to deliver to his (Jensen's) agent, Rime, all bills of lading and invoices for shipments to be cleared through customs by Jensen or by plaintiff. The employes of the Soo Line at Noyes obviously believed that Jensen was acting on behalf of plaintiff and did not question his authority to make the foregoing request, with the result that bills of lading specifically naming plaintiff as consignee for the purposes of clearance were delivered to Jensen, or to his agent, Rime. These bills of lading were then presented to certain employes of the C. P. R. at Emerson, Manitoba, which is across the border on the Canadian side and the corresponding port of exit, for the proposed alterations to be made in the name of the consignee. These employes were obviously unaware of the true situation, and by the use of a rubber-stamp signature of Jensen they either restamped so as to change the name of the consignee from plaintiff to Jensen or permitted Rime to do so under color of Jensen's authority. The evidence is vague and uncertain as to the actual mechanics of the change, but in any event it was made and Jensen was thereby in a position to present the altered bills of lading, specifically designating himself as customhouse broker, to the collector of customs, pay the duty thereon, and collect the brokerage fee for his services. [fol. 732] When plaintiff became aware of Jensen's operations at Noyes he was pressed for an explanation. This he supplied by advising plaintiff that an agreement had been previously effected between plaintiff and one Mackay, another customhouse broker operating at the port of Noyes, by the terms of which plaintiff had agreed not to seek any business at Noyes in consideration of Mackay's not soliciting business at the port of Portal. Mackay testified on behalf of plaintiff, denied the existence of such an agreement, and vehemently denied informing Jensen that there had been such an agreement. Jensen further informed

plaintiff that the business at Noyes was losing money and that the revenue was scarcely sufficient to pay the office personnel. It seems that plaintiff relied upon this explanation until September 1940. By that time the relationship between plaintiff and Jensen had become strained because of other personal differences not here material. A meeting of the board of directors of plaintiff was called in the office of plaintiff's attorney and Jensen was requested to resign his office, which he did.

Shortly thereafter and in the first part of December 1940, plaintiff opened a customhouse brokerage business at Noyes in competition with Jensen and has continued to operate such business ever since that time. This action for recovery of profits made by Jensen in his operations at Noyes was brought on the theory that such profits accrued to plaintiff as a matter of right by virtue of a constructive trust, since Jensen from the beginning of his operations at Noyes was an officer of plaintiff, receiving a salary therefrom, and charged with certain fiduciary responsibilities; that in fact much of the business procured by Jensen was [fol. 733] business intended for plaintiff by reason of the fact that the shippers specifically designated plaintiff as the broker at Noyes to clear the shipments, and that Jensen fraudulently changed or had changed the bills of lading covering these shipments so that he personally was permitted to clear them and receive the fees therefrom.

Jensen admitted that the bills of lading were altered as charged, but contended that it was done pursuant to the shippers' instructions; that the agreement of September 6, 1938, between him and plaintiff was void under North Dakota statute; and, further, that witness Mackay did advise him and actually read to him the reciprocal agreement between plaintiff and Mackay to the effect that plaintiff would not seek business at the port of Noyes in consideration of Mackay's refraining from soliciting business at the port of Portal. Jensen further asserted that the action should be dismissed because plaintiff had not obtained a certificate of authority as a foreign corporation doing business in this state. The court found that plaintiff was not doing business in this state but was engaged in interstate commerce and therefore was not required to obtain a certificate of authority; that Jensen in his fiduciary capacity as the active officer of the corporation broke faith with the stockholders in establishing his own business at Noyes and converted plain-

tiff's business by a change in the bills of lading; that a constructive trust was created in plaintiff's favor; and that plaintiff was entitled to recover of Jensen the sum of $10,324.80 and from defendant Rime the sum of $2,242.36.

Defendants' numerous assignments of error may be grouped together so as to present the following issues for consideration on this appeal:

(1) Did the trial court err in holding that plaintiff [fol. 734] was engaged in interstate or foreign commerce and not amenable to Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20).

(2) Was the validity of the September 6, 1938, contract between plaintiff and Jensen an issue in the case so as to require a finding that it was illegal and void.

(3) Was the court justified in finding that a fiduciary relationship existed between plaintiff and Jensen, thereby creating a constructive trust in plaintiff's favor for the profits here sued for.

(4) Did the evidence justify the finding that Jensen breached his fiduciary obligation to plaintiff by secretly operating the customhouse brokerage business at Noyes for his personal benefit.

(5) Should the profits awarded to plaintiff, in any event, be limited to November 5, 1940, rather than November 30, 1941, the time of trial.

(6) Was there error in awarding judgment against Rime for $2,242.36.

(7) Did the court err in requiring defendants to turn over to plaintiff all books and records relating to the business at Noyes.

(8) Was Jensen entitled to an offset in the amount of salary earned.

Defendants' first assignment of error raises the question of the power of the state of Minnesota to require plaintiff, by statutory regulation, to obtain a certificate of authority before bringing an action in the courts of this state. Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20), insofar as here material, provides:

"No foreign corporation transacting business in this state without a certificate of authority shall be per-

mitted to maintain an action in any court in this state until such corporation shall have obtained a certificate of authority."

Plaintiff is a North Dakota corporation and has not complied with this requirement. The lower court found "that the customhouse brokers, involved herein, are established [fol. 735] as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada."

Defendants contend that this was error; that plaintiff is not a federal instrumentality engaged in interstate commerce; that the business of plaintiff is purely local and intrastate in character, and, if it affects interstate commerce at all, it does so only indirectly and as an aid and facility of such commerce; that plaintiff is therefore subject to the requirements of the statute and the case should have been dismissed by the lower court.

Plaintiff asserts that the finding was proper; that, inasmuch as its business is so closely related to and directly affects interstate commerce, it is entitled to the privilege of immunity from state regulatory power under U. S. Const. art. I, § 8, which reserves to congress the right to regulate commerce between the states and foreign nations; that it was not doing business within the state within the meaning of the statute and hence not amenable to the requirements thereof. We consider this issue first, inasmuch as a determination thereof adversely to plaintiff disposes of the appeal without the necessity of considering the other issues presented by defendants' assignments of error.

It is well settled that a state may impose such restrictions as it sees fit as a prerequisite to a foreign corporation coming into the state to do business. Bank of Augusta v. Earle, 38 U. S. (Pet.) 519, 588; Lafayette Ins. Co. v. French, 59 U. S. (How.) 404; Paul v. Virginia, 75 U. S. (Wall.) 168; Railway Exp. Agency, Inc., v. Virginia, 282 U. S. 440. Equally well settled, however, is the limitation on the state's right to exclude foreign corporations from doing busi- s [fol. 736] within the state within the meaning of U. S. Const. art. I, § 8, where the business has a substantial relation to interstate commerce. The control of congress over interstate business is exclusive. Gibbons v. Ogden, 22 U. S. (Wheat.) 1. Any attempt on the part of the states to reg-

ulate or interfere with such commerce is void. Crutcher v. Kentucky, 141 U. S. 47; Western Union Tel. Co. v. Kansas, 216 U. S. 1, 7. Statutes similar to the one here invoked by defendants have usually been held to place an undue burden on interstate commerce and hence to be unconstitutional as to foreign corporations engaged in interstate business. Davis v. Farmers Co-op. Equity Co. 262 U. S. 312; Sioux Remedy Co. v. Cope, 235 U. S. 197. The conflict arises in the application of these rules to the facts and circumstances in each particular case and in the determination of the issue of whether the business involved is intrastate in character or has such a vital and substantial relation to commerce as to constitute it interstate business under the commerce clause of the constitution.

Probably no subject in the field of law has created greater ambiguity and confusion among text writers and in court opinions than the interpretation of the commerce clause of the constitution. Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215. There has not always been uniformity in the federal decisions even with respect to the general principles to be followed. 4 Missouri L. Rev. 207; Wickard v. Filburn, 317 U. S. 111, 63 S. Ct. 82, 88. In the Wickard case the court exhaustively discusses this matter, and in considering many [fol. 737] prior decisions, says (317 U. S. 122):

> "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

In Santa Cruz F. P. Co. v. National L. R. Board, 303 U. S. 453, 466, Mr. Chief Justice Hughes, indicating the difficulty of adopting rigid formulas and the use of the words "direct" and "indirect," uses this language:

> "• • • 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and

substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.'"

Similarly, in the Wickard case, 317 U. S. 111, 124, 63 S. Ct. 82, *supra*, the court states that the mechanical application of legal formulas is no longer feasible. Thus we observe the confusion that has resulted in an attempt to define interstate commerce, but the greater difficulty has arisen in attempting to apply the general principles to the factual situation in each case. It may generally be said, however, that in view of the grant of power by the constitution to congress to regulate interstate commerce, such grant, without any action by congress, prevents the states from exercising any direct control thereof with relation to the subjects embraced within its purview and that the grant is of such a nature as to require that, if there is any regulation, it should be prescribed by the single authority. Minnesota Rate Cases, 230 U. S. 352; Southern Express Co. v. Byers, 240 U. S. 612. Where a subject is national in its character, in- [fol. 738] volves a matter of public policy, and requires uniformity of regulation, congress alone has the prerogative to provide the needed regulations. Louisiana P. S. Comm. v. Texas & New Orleans R. Co. 284 U. S. 125; Missouri P. R. Co. v. Stroud, 267 U. S. 404; York Mfg. Co. v. Colley, 247 U. S. 21; Wickard v. Filburn, *supra*. The fact that congress has been silent in such a case has been held to be a declaration that the particular commerce should be free from regulation. Sanitary District v. United States, 266 U. S. 405; Missouri ex rel. Barrett v. Kansas N. G. Co. 265 U. S. 298; Covington and C. Bridge Co. v. Kentucky, 154 U. S. 204. Despite this well defined power of congress over strictly interstate commerce, it cannot be extended so as to include regulatory control over a business which has no substantial relation to such commerce and does not involve a question of national concern. To permit such control would be voluntarily to eliminate the distinction between what is national and what is local and create a completely centralized government. National L. R. Board v. Jones & Laughlin Steel Corp. 301 U. S. 1. It is clear, therefore, that the power of

congress is paramount in the field of interstate commerce and in matters which affect national public policy and require uniformity of regulation. It is equally clear, however, that this power does not extend to cases where the business is local or intrastate. Schechter Poultry Corp. v. United States, 295 U. S. 495; National L. R. Board v. Jones & Laughlin Steel Corp., *supra*; Minnesota Rate Cases, 230 U. S. 352, *supra*.

The greatest difficulty does not arise in these two classes of cases where it appears reasonably clear that the business is either strictly local and has no connection whatever with [fol. 739] interstate commerce or where the business is of an interstate character and a matter of national concern. The real problem is presented in those situations where the business may to some extent affect interstate commerce, where congress has not seen fit to regulate, and where no question of national public policy is involved. In that group of cases the line of demarcation cannot always be clearly drawn. But a case must necessarily fall within one class or the other, depending upon how substantially the commerce has been affected. The question must be determined upon the particular circumstances and rights involved in each situation. Hall v. DeCuir, 95 U. S. 485. In the recent case of Cohn-Hall-Marx Co. v. Feinberg, — Minn. —, 8 N. W. (2d) 825, filed April 2, 1943, this court held that whether the business in question was one having the attributes of interstate commerce or intrastate commerce was a question of fact. In such doubtful cases the fact that a business is local in character is an important factor for consideration. The following language, found in Wickard v. Filburn, 317 U. S. 111, 124, *supra*, is pertinent here:

> "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. *The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce.* * * * it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" (Italics supplied.)

In this group of cases where no substantial effect upon the commerce appears, absent congressional regulation, the states are free to act. When congress does act, however, the exercise of its authority overrides all conflicting state [fol. 740] regulation where the exercise of such power has a real or substantial relation to some part of the commerce itself. Minnesota Rate Cases, *supra;* Second Employers' Liability Cases, 223 U. S. 1; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186. If the effect of intrastate transactions under interstate commerce is only remote and does not encroach substantially thereon, such transactions remain within the province of state power. Hammer v. Dagenhart, 247 U. S. 251; Minnesota Rate Cases, *supra;* Covington and C. Bridge Co. v. Kentucky, 154 U. S. 204, *supra;* Adair v. United States, 208 U. S. 161.

The law applicable to this vexatious and difficult problem is summarized by Mr. Chief Justice Stone in the case of United States v. Wrightwood Dairy Co. 315 U. S. 110, 119, in the following language:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. * * * The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. *Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.*"

The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff *in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce.*

In applying this principle so recently enunciated by the Supreme Court of the United States to the facts here pre-

sented, it is necessary to consider the character of the busi-
[fol. 741] ness in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. Duluth S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55; People ex rel. Tower v. State Tax Comm. 282 N. Y. 407, 26 N. E. (2d) 955; State v. Wm. J. Oberle, Inc. 190 La. 1053, 183 So. 347. True, under the tariff act, customhouse brokers are required to be licensed in order to do business, but the sole purpose of that requirement is to protect the collection of tariffs due the federal government. State v. Wm. J. Oberle, Inc., *supra*. The office of plaintiff was situated in Noyes, Minnesota, and all of its records pertaining to that business were kept there. The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce. Its duty as an agent of the shipper was merely to pay the customs duties and make settlement subsequently with its principal, the shipper. Customhouse brokers represent private persons. They receive no fees or emoluments from the federal government. A customhouse broker's license authorizes the holder to transact business in certain customs collection districts. He cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the department. We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. It is urged that because the customhouse broker pays the duties he has a direct and substantial connection with the commerce; that the commerce would be delayed if the duties were not paid. It must be borne in mind, however, that under the tariff act the shipper him-
[fol. 742] self or his agent can perform this service. Article 1411, Custom Regulations of 1937, provides in part:

> "(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business."

The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. He is at the most an aid

or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce.

Plaintiff relies upon the case of Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735, in support of its position that the business here in question is interstate commerce. We believe that case to be distinguishable upon the facts. There congress had definitely exercised its prerogative to legislate concerning a matter of national public concern and public policy. There had developed considerable abuse in the shipping and packing house industry, and congress saw fit to eliminate these abuses by appropriate legislation. The commission men in the Wallace case had actual contact with the movement of the commerce itself, and it was clearly a matter of interstate concern affecting all of the states alike. In the instant case, the matter of public policy or public concern is not involved. The customhouse brokerage business is purely a private business conducted for personal profit. Congress has merely provided that such brokers shall be licensed before doing business in order to [fol. 743] insure the collection of the tariff owing the United States. We therefore feel that the Wallace case is not in point here.

While the case of Puget Sound Stevedoring Co. v. State Tax Comm. 302 U. S. 90, 58 S. Ct. 72, 82 L. ed. 68, is not squarely in point, we believe that that phase of it having to do with the furnishing of employes to the steamship companies for stevedoring duties where the company did not exercise any control or direction over their duties is more closely analogous. In that case the court determined that where the stevedoring corporation furnished the laborers and retained supervision and control over their activities, where they actually assisted in loading and unloading the articles of commerce, such activity was interstate commerce; but that if these employes had been furnished to the steamship companies without supervision or direction, then there was no direct relation to the commerce and the employer would be but an independent contractor. Similarly, the customhouse broker, in paying the duties, is but an independent contractor under his contractual relationship with the shipper. State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347, *supra*.

Although the United States Supreme Court has not passed directly on the precise question here presented, the supreme court of Louisiana has had occasion to consider it. In a well-reasoned opinion it has held that the business of a customhouse broker is intrastate rather than interstate in character. State v. Wm. J. Oberle, Inc. *supra*. There the state of Louisiana sought to impose upon defendant, a customhouse broker, an occupational license tax, and contended that the defendant was engaged in a purely private business [fol. 744] and subject to the general tax. The defendant asserted that he was a customhouse broker, duly licensed by the secretary of the treasury of the United States, and could not be subjected to such a tax (190 La. 1055), "as to do so would unconstitutionally burden 'a purely Federal and quasi Federal function', and would interfere 'with the commerce laws of the United States and particularly with the importation and exportation of commerce.'" In considering the nature of defendant's business, the court said (190 La. 1058):

> "We fail to see wherein the occupational license tax to which the State seeks to subject defendant, as a customhouse broker, would interfere 'with the commerce laws of the United States and particularly the importation and exportation of commerce', as contended by defendant. The evidence fails to show that defendant is engaged in either. Defendant receives its business from importers of merchandise, private persons. • • • Defendant is not itself an importer of merchandise. If it were, it would not be licensed as a customhouse broker."

And, further (190 La. 1059):

> "The State in this case is not demanding that defendant pay an occupational license tax as an importer, but only on its receipts, as customhouse broker, from importers of merchandise, private persons, a purely local business."

Fortifying the conclusion that customhouse brokerage business is intrastate rather than interstate is the case of People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955. Although in that case this issue was not directly involved, the court, in holding that the business was subject to a professional tax, inferentially held that it was

doing business within the state and amenable to state regulation and therefore not engaged in interstate commerce. See also Duluth S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, wherein the customhouse broker was held not to be a public officer. Significant in the instant case is [fol. 745] the fact that the treasury department, under date of April 20, 1936, issued a regulation, § 6 of which in part provides (Art. 1410, Customs Regulations of 1937):

> "However, a licensee having a license in force in one district may on application to the Committee be granted a license to transact busines in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated, and is prepared and qualified to render efficient service in such other district."

Subsequent to the adoption of this regulation, congress amended the tariff act in several respects, although the provisions governing customhouse brokers have remained substantially the same. By such regulation the treasury department has placed a practical construction on the character of the customhouse brokerage business as affecting commerce. It infers that it was the opinion of the treasury department that the statutory provision requiring a certificate of authority from a foreign corporation, as relating to such business, did not encroach upon interstate commerce. The provision that brokers may qualify to do business in more than one district, provided they are authorized to do business in the particular states in which such other districts are located, definitely implies that the department considers such business truly local and intrastate; and surely, if the business is intrastate when operated in two or more districts, it is equally intrastate when operated in a single district. Inasmuch as the tariff act was revised subsequent to the regulatory provision referred to without modifying this provision, "under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." Helvering v. R. J. Reynolds Tobacco Co. 306 U. S. 110, 115. [fol. 746] Since early days when Chief Justice Marshall in Gibbons v. Ogden, 22 U. S. (Wheat.) 1, so clearly set forth the principles to be applied in construing the commerce clause, there have been alternatively restrictive and broad

interpretations given to this provision of the constitution. Revealing the present day trend of the effect of state regulation upon the commerce, even where congress has legislated, is the recent case of Parker v. Brown, 317 U. S. 341, 63 Supp. Ct. 307, discussed in Vol. 27, Minn. L. Rev. p. 468. When abuses creep into our national economy or where other problems arise which are of vital public concern and present issues of national public policy, it is natural and commendable that the commerce clause should be given a broad interpretation so as to sustain legislation by the congress having for its laudable purpose the elimination of abuses and the solution of these problems. As the court said in Wickard v. Filburn, 317 U. S. 122, *supra*:

> "Even while important opinions in this line of restrictive authority were being written, however, other cases called for the broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in Gibbons v. Ogden, *supra*."

While it is our duty fully to recognize this most recent trend in the construction of the commerce clause by the Supreme Court of the United States, we are unable to find, even in these recent decisions, any inclination on the court's part to interfere in purely local intrastate matters. It is entirely consistent with these decisions and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our government [fol. 747] during its century and a half of existence. Where congress has not stepped into the field of regulation because of the fact that some national public policy or concern is not involved, and where the business, as here, is local in character, relates only to personal services, is conducted for private profit, and is not an instrumentality of commerce, the courts should be loathe to suggest that the state cannot enforce a reasonable regulation for the benefit of its citizens such as the statute here in question. The provisions of this statute require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hardship upon the

business. Nor do we think that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case. On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief. Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirement is a proper regulation for the state to prescribe, and that the constitutional power of congress is in no way impaired thereby.

Defendants' motion to dismiss the action at the close of plaintiff's case therefore should have been granted.

Reversed.

Luther Youngdahl.

[fol. 748] STATE OF MINNESOTA, SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Respondent,

vs.

NORMAN G. JENSEN and CURTIS M. RIME, Appellants

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Kittson, be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellants herein, do have and recover of respondent herein the sum and amount of Nine Hundred Ninety-Three and 59/100 Dollars, ($993.59) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Date and signed June 3, 1943, by the Court.

Attest: Grace Kaercher Davis, Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00. Printer $608.57. Clerk $5.00. Acknowledgments $——. Return $10.00. Postage and Ex-

press $——. Appeal Bond $110.00. Transcript $235.02; Total $993.59.

Satisfaction of Judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest: —— ——, Clerk
By: —— ——, Deputy.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Grace Kaercher Davis, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, June 3, 1943.

Grace Kaercher Davis, Clerk, by —— ——, Deputy.

[Endorsed:] State of Minnesota, Supreme Court. 33388. Union Brokerage Company, a Corporation, Respondent, vs Norman G. Jensen, et al., Appellants, Transcript of Judgment.

[fol. 749] STATE OF MINNESOTA, IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

vs.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

STIPULATION

Whereas the Plaintiff-Respondent is about to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of the Supreme Court of the State of Minnesota in the above entitled proceeding and has submitted its proposed Order staying pro-

ceedings and the bond required to secure a stay of proceedings for the approval of the Appellants, by the attorneys for the appellants above named,

It is Stipulated as Follows:

1. It is stipulated and agreed by and between the parties to the above entitled action, by and through their respective attorneys of record, that the form of the bond proposed to be so furnished by the Plaintiff-Respondent above named, is approved.

2. That the form of the proposed Order for Staying Execution is hereby approved.

3. That the Chief Justice of the Court above named, or any of the Justices thereof, is hereby authorized to approve said Bond when executed with sufficient surety, and to sign the Order staying proceedings in the form hereto annexed.

Dated: June 2nd, 1943.

Leonard Eriksson, Attorney for Plaintiff-Respondent; Bundlie, Kelley & Finley, Attorneys for Defendants-Appellants.

[fol. 750] STATE OF MINNESOTA, IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

v.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

ORDER STAYING EXECUTION

On reading and filing the annexed Motion herein of and on behalf of the Union Brokerage Company, a corporation, Plaintiff-Respondent, for a stay of execution of the judgment entered herein May 25, 1943, pursuant to the decision of this Court dated May 14, 1943, and pending the decision of the Supreme Court of the United States on the applica-

tion of said Union Brokerage Company for a Writ of Certiorari, addressed to said Supreme Court of the United States to review said judgment and decision made and entered as aforesaid, is hereby granted.

It Is Further Ordered that execution of said judgment is hereby stayed until the disposition of the Plaintiff-Respondent's application for said Writ of Certiorari. Provided that the said Union Brokerage Company shall on or before June 5, 1943, file herein its undertaking, under seal, with surety to be approved by this Court, or by one of the Justices thereof, in the maximum penalty of $1,250.00, conditioned that if it, the said Union Brokerage Company shall on or before June make application for a Writ of Certiorari to the Supreme Court of the United States within the period allotted therefor, or fails to obtain an Order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Norman G. Jensen and Curtis Rime may sustain by reason of said stay.

Dated at Saint Paul, Minnesota, this 4th day of June, 1943.

By the Court:

Henry M. Gallagher, Chief Justice of the Supreme Court of the State of Minnesota.

[fol. 751] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendant-Appellants

Motion for Stay of Execution Pending Application for Writ of Certiorari

To the Honorable, the Justices of the Supreme Court of the State of Minnesota:

Now comes Union Brokerage Company, a corporation, the above named Plaintiff-Respondent, and moves the Court for an Order staying execution of any and all proceedings to enforce the judgment entered in favor of the Defendants-Appellants herein on May 25, 1943, pursuant to the decision of this Court dated May 14, 1943, pending disposi-

tion of Plaintiff-Respondent's application to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of this Court rendered as aforesaid.

Said motion is made on the ground that the said Union Brokerage Company, Plaintiff-Respondent, is in good faith proceeding to apply for a Writ of Certiorari to review said decision of this Court by the Supreme Court of the United States, and on the ground that unless said judgment is stayed pending said last mentioned proceeding, the plaintiff-respondent will suffer irreparable injury, and on the annexed Affidavits.

Leonard Eriksson, Attorney for Plaintiff-Respondent, Fergus Falls, Minnesota. Lewis L. Drill, 903 Commerce Building, Saint Paul, Minnesota, and James S. Eriksson, Fergus Falls, Minnesota, of Counsel.

[fol. 752] STATE OF MINNESOTA IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

vs.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

AFFIDAVIT OF: NAN W. ANDERSON AND ANNIE KRAMER

STATE OF MINNESOTA,
County of Ramsey, ss:

Nan W. Anderson and Annie Kramer, being each duly sworn, each say upon their oaths:

That they are respectively the president and the Secretary of the Union Brokerage Company, a corporation, the plaintiff-respondent in the cause above entitled.

That they are also, respectively, the principal stockholders and two of the directors of said corporation.

That the corporation above named, by its Board of Directors, has duly adopted a resolution authorizing and directing these affiants to institute and prosecute its application for a writ of certiorari to the Supreme Court of the United States for a review of the decision and judgment rendered in the cause above entitled by the Court above named on May 14, 1943, because said corporation feels aggrieved

thereby, and that in order to effect said review proceedings, and to enable these affiants to discharge the duty imposed on them as aforesaid, and to secure time within which to apply for the necessary writ of certiorari by the Supreme Court of the United States without loss to their corporation, it is necessary and in furtherance of justice that a stay of execution of the judgment entered in this Court pursuant to said decision on May 25, 1943, be granted as provided for by Section 350, Title 28, U. S. C. A. (Act of February 13, 1925, c. 229).

That the plaintiff-respondent submits herewith a good and sufficient bond in the penal sum of $1,250.00 for ap-[fol. 753] proval as a stay bond to protect the interests of the defendants-appellants under said judgment pending the outcome in the Supreme Court of the United States of plaintiff-respondent's application for a writ of certiorari as aforesaid.

That the review proceedings begun and hereafter continued in this cause are made in good faith.

That unless the order for the stay of execution if granted, the said plaintiff-respondent will suffer irreparable injury.

Nan W. Anderson, Annie Kramer.

Subscribed and sworn to before me this 3rd day of June, 1943. Lewis L. Drill, Notary Public, Ramsey County, Minn. (Seal.) My Commission Expires April 9, 1949.

[fol. 754] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendants-Appellants

Affidavit of Leonard Eriksson in Support of Motion

State of Minnesota,
County of Ramsey, ss:

Leonard Eriksson, being first duly sworn, says upon his oath:

That he is one of the attorneys of the plaintiff-respondent in the action above entitled, and is familiar with the relief

granted by the District Court of the Fourteenth Judicial District, and with the practical effect thereof, as well as with the practical effect of the decision of this Court, upon the business and property of the plaintiff.

That among the relief granted by the trial court was the provision that the defendants should surrender and turn over to this plaintiff all records, correspondence, accounts and commissions accrued from the conduct of the customhouse brokerage business carried on at Noyes, Minnesota, by the defendants since July 1, 1940, to and including November 30, 1941.

That said records and accounts pertaining to, and accruing from, said customhouse brokerage business at said place during the aforesaid time are, for all practical purposes, irreplaceable, and of the greatest conceivable value and need to the future conduct of said customhouse brokerage business by the plaintiff.

That the commissions involved in, and due from, the payment of refunds on entries protested according to law during said period of time are of great value; that the amount thereof for said period of time, as affiant is informed and verily believes, ranges between $2,000.00 and $3,500.00; that a part of said commissions have already been received by the defendants; that the stay bond executed by the defendants is insufficient to protect the plaintiff against the loss of said commissions; that there is available, or about to become available, other commissions on entries protested [fol. 755] and ordered to be reliquidated, or about to be ordered reliquidated, by the Customs Court of the United States, a sum of money ranging between $1,500.00 and $2,500.00.

That the defendants are either insolvent or so keep their property concealed that without the security afforded by the existing stay bond, the holding of the money garnisheed, and keeping the action in status quo during the pendency of the review proceedings ordered to be instituted and prosecuted by the plaintiff, the plaintiff above named will suffer the loss of its records and of its money to plaintiff's great and irreparable loss and damage.

That the direct money judgment rendered by the trial court in this cause, with accrued interest and costs, exceeds in amount the sum of $10,000.00. That to insure the payment of said judgment the defendants above named furnished a corporate surety bond in the penal sum of

$11,000.00, and no more, and said bond was a stay bond. That unless the order staying proceedings for the enforcement of the judgment entered in this court in favor of the defendants on said appeal, said $11,000.00 appeal and stay bond of the defendants may be annulled, and the surety thereon discharged. That thereby this plaintiff will be deprived of the security now available for the payment of the money judgment aforesaid. That without the security afforded to the plaintiff by said bond in the penal sum of $11,000.00 the plaintiff will lose all chance to recover the money due to plaintiff which was adjudged in its favor in the event the Supreme Court of the United States shall reverse the decision and judgment of this court.

That this affidavit is made in support of plaintiff's motion for a stay of all proceedings in this court pending the determination of plaintiff's review proceedings in the United States Supreme Court.

Leonard Eriksson.

Subscribed and sworn to before me this 3rd day of June, 1943, Lewis L. Drill, Notary Public, Ramsey County, Minn. (Seal.) My commission expires April 9, 1949.

Supreme Court Filed Jun. 4, 1943. Grace Kaercher Davis, Clerk.

[fol. 756] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendant-Appellants

Bond on Stay of Execution

The Court, having ordered a stay of execution of the judgment rendered herein on May 25, 1943, pursuant to the Court's decision in the above entitled matter on the 14th day of May, 1943, pending the disposition of an application for a Writ of Certiorari by the Union Brokerage Company, a corporation, the Plaintiff-Respondent above

named, to the Supreme Court of the United States to review the said decision and judgment of the Court above named rendered as aforesaid, on the condition that the plaintiff-respondent above named give an undertaking, with sureties to be approved by this Court, in the sum of $1,250.00, conditioned that if the said Union Brokerage Company, Plaintiff-Respondent, fails to make application for such Writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the Defendants-Appellants may sustain by reason of said stay.

Now, therefore, pursuant to the terms of said order staying the execution of said judgment, the undersigned Union Brokerage Company, a corporation, as principal, and *United States Casualty Company, a corporation of the State of New York*, as surety, are hereby jointly and severally held and firmly bound to Norman G. Jensen and Curtis Rime, Defendants-Appellants, their executors, representatives, heirs and assigns in the amount of $1,250.00, lawful money of the United States, to the payment of which well and truly to be made to the said Norman G. Jensen and Curtis Rime, the said Union Brokerage Company, a corporation, as aforesaid, and *the said United States Casualty Company, a corporation of the State of New York*, as surety, hereby bind ourselves and each of us, our and each of our successors and assigns firmly by these presents. [fol. 757] The condition of this obligation is that if the Union Brokerage Company, a corporation, Plaintiff-Respondent, fails to make application for a Writ of Certiorari to the Supreme Court of the United States within the period allotted therefor, or fails to obtain an Order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Norman G. Jensen and Curtis Rime may sustain by reason of said stay.

This bond is given pursuant to Section 350, Title 28, U. S. C. A. (Act of February 13, 1925, c. 229).

In Witness Whereof, the said Union Brokerage Company, a corporation, and the said *United States Casualty Company, a corporation of the State of New York*, have hereto affixed their respective seals and caused the same

to be executed by its proper offices this *4th* day of June, 1943.

Union Brokerage Company, By Nan W. Anderson, Its President, Annie Kramer, Its Secretary.

United States Casualty Company, By Earl H. Sauer, Attorney-in-Fact. (Seal.)

In presence of the undersigned as witness Lewis L. Drill, Leonard Eriksson.

STATE OF MINNESOTA,
County of Minnesota, ss.

On this 4th day of June, A. D. 1943, before me, a Notary Public, within and for said County and State, personally appeared Earl H. Sauer, to me personally known, who being by me duly sworn, did say that he is the Attorney-in-Fact of and for the United States Casualty Company, a New York corporation; that the seal affixed to the foregoing instrument is the corporate seal of the said Company; that said instrument was signed and sealed in behalf of said Company by authority of its Board of Trustees; and the said Earl H. Sauer did acknowledge that he executed the said instrument as the free act and deed of said Company.

Lewis L. Drill, Notary Public, Ramsey County, Minn. My commission Expires April 9, 1949.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of June, 1943, before me, a Notary Public within and for said County, personally appeared Annie Kramer and Nan W. Anderson, to me personally known, who, being each by me duly sworn, did say that they are, respectively, the President and Secretary of the Union Brokerage Company, a corporation, named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corpora- [fol. 758] tion by authority of its Board of Directors and said Annie Kramer and Nan W. Anderson acknowledged

said instrument to be the free act and deed of said corporation.

Lewis L. Drill, Notary Public, Ramsey County, Minn. My Commission Expires April 9, 1949, (Seal.)

O. K. as to form, O. T. Bundlie.

Supreme Court, Filed Jun 4—1943. Grace Kaercher Davis, Clerk.

The within bond and the sureties thereon is hereby approved this 4th day of June 1943.

Henry M. Gallagher, Chief Justice, Minnesota Supreme Court.

[fol. 759] Assignments of Error

I

The findings of fact, conclusions of law, and judgment are contrary to law, in the particulars following:

A.

The Court erred in holding, as a matter of law (part of its Finding 5; R. p. 699, ff. 1)

". . . That the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada." • • • .

D.

The Court erred, as a matter of law, in denying defendants' motion for dismissal of action (exceptions allowed as to all adverse rulings; R. p. 288, ff. 1, 2), made upon the conclusion of plaintiff's case (R. p. 625, ff. 2, 3; R. p. 626, f. 1) as follows:

"Mr. Murphy: Plaintiff having rested the defendants move that this action be dismissed on the following grounds: First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws of the State of

Minnesota and is not entitled to sue in the State of Minnesota; second, on the ground that the evidence wholly fails to prove or sustain any of the allegations contained in the plaintiff's complaint; third, we move to dismiss as to the defendant Rine (Rime) as there is absolutely no evidence in this case which in any way tends to prove or sustain any allegations as to him, it appearing from the record that he never at any time had been affiliated with or employed by or connected with the plaintiff company and was under no obligation or duty of any kind with respect to the same. I want to make that motion for the record at this time."

* * * * * * *

"1

"That plaintiff have and recover of the defendant Norman G. Jensen, the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars with interest thereon from November 30, 1941, at the rate of six (6%) per cent per annum.

"2

That plaintiff have and recover of the defendant Curtis M. Rime, the sum of one thousand eight hundred seventy-five (one) and 66/100 ($1,871.66) dollars with interest thereon at the rate of six (6%) per cent. per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant Norman G. Jensen.

[fol. 760] "3

That the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all

claims for rebates, commissions, fees, or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for underpayments or money due or to become due the United States Government on account of said business."

II (G)

Finding 24 (R. p. 709, F. 3; R. p. 710, ff. 1, 2, 3, R. p. 711, f. 1) as follows:

"That after re-routing of said business many of the shippers with whom plaintiff had formerly done business at Portal continued to consign their shipments to plaintiff at Noyes, Minnesota; that said shipments could not be cleared at Noyes, Minnesota, by the defendant Jensen in his own name without causing a change to be made in the bill of lading; that in order to enable him to appropriate said business to his own use, the defendant Jensen had procured a rubber stamp containing thereon his own name, which he left at the depot at Emerson, Manitoba which is the port of exit of shipments entering the United States at the port of Noyes; that the defendant Jensen then prepared and left with the agent in charge of the depot at Noyes, Minnesota, instructions in writing reading as follows:

Mr. MacKenzie, June 29, 1940.
Noyes, Minn.

Sir:

Kindly deliver to Mr. Curtis Rime all bills of lading, and invoices for shipments to be cleared through customs by Norman G. Jensen or Union Brokerage Co.

Sincerely, Norman G. Jensen.

that pursuant to said instructions, and acting upon the belief that the defendant Jensen was acting for plaintiff as its officer, bills of lading consigned to plaintiff were delivered to the defendant Rime; that

he thereupon took said bills of lading to the depot at Emerson, Manitoba, stamped the name of Norman G. Jensen over the name of plaintiff and altered the same so as to show Jensen's name as broker consignee and thereafter cleared said shipments in Jensen's name at Noyes, Minnesota."

[fol. 761] II (N)

Finding 33 (R. p. 716, f. 3; R. p. 717, f. 1) as follows:

"That the defendant Jensen, while establishing said business at Noyes, was acting in a fiduciary capacity for plaintiff; that he owed it a duty of disclosing the information acquired while so acting, affecting, or about to seriously affect, its business; that he wrongfully converted said business to his own use; that said business and the income and profits thereof in equity and good conscience belonged to plaintiff and that the defendants held and operated the same in trust for the plaintiff during the times herein stated."

II (P)

Conclusions of Law 1 (R. p. 717, f. 3) as follows:

"That plaintiff have and recover of the defendant, Norman G. Jensen the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars, with interest thereon from November 30, 1941, at the rate of six (6%) per cent per annum."

II (Q)

Conclusions of Law 2 (R. p. 717, f. 3; R. p. 718, f. 1) as follows:

"That plaintiff have and recover of the defendant Curtis M. Rime, the sum of One thousand eight hundred seventy-five (one) and 66/100 ($1,871.66) dollars with interest thereon at the rate of six (6%) per cent. per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant, Norman G. Jensen."

II (K)

Conclusions of Law (R. R. p. 718, ff. 2, 3) as follows:

"That the defendants, and each and both thereof, surrender and deliver to plaintiff or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for under payments of money due or to become due the United States government on account of said business."

III

That the judgment entered and filed on August 20, 1942, pursuant to said findings of fact, conclusions of law and order for judgment (R. pp. 721, 722, 723 and 724) is contrary to law and the evidence, except as to the dismissal of the second cause of action. (R. p. 724, f. 1).

[fol. 762] STATE OF MINNESOTA, IN SUPREME COURT

I, Grace Kaercher Davis, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 761 inclusive, are a true, full and complete transcript of the record and proceedings in the case of, 33388, Union Brokerage Co., Respondent, vs. Norman G. Jenson, et al., Appellants, and the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of St. Paul, Minnesota, this 30th day of June, 1943.

Grace Kaercher Davis, Clerk of Supreme Court, by Mae Sherman, Deputy. (Seal.)

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on back cover: File No. 47,784. Minnesota, Supreme Court, Term No. 291. Union Brokerage Company, Petitioner, vs. Norman G. Jensen and Curtis M. Rime. Petition for a writ of certiorari and exhibit thereto. Filed August 25, 1943. Term No. 291 O. T. 1943.

(9236)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

LEONARD ERIKSSON,
JAMES S. ERIKSSON,
Counsel for Petitioner.

LEWIS L. DRILL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Union Brokerage Company, a North Dakota corporation, prays for a writ of certiorari herein to review the final decision and judgment of the Supreme Court of the State of Minnesota, said decision having been rendered on May 14, 1943, and said judgment having been entered on May 25, 1943, in the above entitled cause.

I.

Questions Presented.

Conceding that the State of Minnesota may impose such restrictions as she may see fit as prerequisite conditions for allowing a foreign corporation to come into the State

to do business therein where the business of such corporation has no substantial relation to interstate or foreign commerce, the following questions are presented:

1. Where, as here, a corporation, organized under the laws of North Dakota, is engaged in the business of customhouse broker under license granted by the United States Treasury Department, pursuant to an Act of Congress, for a United States customs collection district embracing the States of North Dakota, South Dakota, and one county of the State of Minnesota, Kittson County, may the State of Minnesota by judicial decree or statute law, deny to such a customhouse broker access to her courts within said territory, for the protection of its property, because of its failure to comply with a statute which provides that a foreign corporation can not bring an action in the courts of Minnesota without a Certificate of Authority to do business therein?

2. Do the requirements of the Minnesota Foreign Corporation Act burden or obstruct "commerce", within the purview of clause 3, sec. 8, Art. I of the Constitution of the United States, when applied so as to forbid customhouse brokers from the use of her courts without complying with the provisions of the Minnesota Foreign Corporation Act?

3. May the State of Minnesota impair or limit the right of the Petitioner, which is a North Dakota corporation duly licensed to engage in the business of a customhouse broker, to exercise freely the privileges arising from its Federal license as a customhouse broker, in that part of the district which lies within the borders of Minnesota?

4. By deciding that Petitioner must comply with the provisions imposed by the Minnesota Foreign Corporation Act, (Ch. 200, Laws of Minnesota, 1935; Sec. 303.03, 303.06, 303.7, 303.10 to 303.14, both inclusive, 303.16, 303.17, 303.18, 303.20 and 303.21 of Minnesota Statutes, 1941; 7495-2, 7495-4 to 7495-17, 7495-20 and 7495-21, Mason's Minnesota

Statutes, 1927, Vol. 3, 1938 Supp.) before it may have access to the courts of Minnesota for judicial relief, is the Petitioner denied the privileges and immunities guaranteed by clause 1, of Sec. 2, Art. IV, of the Constitution of the United States?

5. Is the ruling of the Supreme Court of Minnesota an interference with, and an attempt to nullify, an Act of Congress enacted to protect the revenue of the United States and her commerce with a foreign country?

6. Is a Federally licensed customhouse broker an instrumentality employed by the Government of the United States to facilitate the free flow of commerce between foreign countries and the United States, and to protect the revenue of the Federal Government?

7. By deciding that Petitioner must comply with the provisions imposed by the Minnesota Foreign Corporations Act (Ch. 200, Laws of Minnesota, 1935) before it may appeal to her courts for judicial relief, has the Petitioner been denied the privileges and immunities guaranteed by the Constitution of the United States?

II.

Summary Statement of the Matter Involved.

Your petitioner seeks to have this Court review the decision of the Supreme Court of Minnesota in the case entitled:

"33388

UNION BROKERAGE COMPANY, a Corporation,
Respondent,

vs.

NORMAN G. JENSEN and CURTIS M. RIME, Appellants"

Handed down on May 14, 1943, as yet unreported in the official Minnesota Reports, but reported in 9 N. W. (2) p.

721, reversing the judgment of the District Court, Kittson County, 14th Judicial District of Minnesota, entered on August 20, 1942. (Fol. 3 and pp. 722, 723 and f. 1, p. 724, R.)

The judgment of the District Court adjudged that Petitioner recover from Respondents $10,324.80 and that the Respondents surrender and deliver to Plaintiff (Petitioner) "all books of account, correspondence, claims for rebates and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940 to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due, or to become due on account of business so conducted prior to and including the 30th day of November, 1941, and upon the assumption of liability on the part of plaintiff for any amount that is due, or may become due, for underpayments of money due, or to become due, the United States Government on account of said business." (Lines 14-19, p. 723 R.)

Your Petitioner is, and has been at all times covered by this action, a customhouse broker as the term is defined in Sec. 2 (a) of the "Rules and Regulations Relating to Customhouse Brokers," being Department Circular #559, dated April 16, 1936, and filed with the Division of the Federal Register, April 20, 1936, 9:48 a. m. (Par. 2, of the District Court's Findings of Fact, p. 697, R.; Lines 18 to the end of the sentence in line 26, p. 728, R.; Exhibit "A".)

The Secretary of the Treasury has defined a customhouse broker to include "any person, who, acting on behalf of others, transacts customs business not limited to a kind described in Sec. 7, of these regulations," and "person" to include "corporations, associations and partnerships." (Sec's 2(a), (d); Exh. "A".)

Congress has authorized the creation by the President of 48 Customs Collection Districts in the United States, includ-

ing Alaska, Hawaii, and Puerto Rico. Each of these Customs Collection Districts has been geographically defined and the district involved in this action is the "Dakota" Customs Collection District, also identified as District #34. This Customs Collection District includes within its area the States of North and South Dakota and the County of Kittson, in the State of Minnesota. (Par. 7 of Findings of Fact of the District Court, p. 699 R.; Sec. 2, Title 19, U. S. C. A. together with historical note.)

Your petitioner's license during the times involved in this action covered all of this Customs Collection District. Thus its license was valid in a part of the State of Minnesota.

Your petitioner is a North Dakota Corporation. (Par. 1, of the District Court's Findings of Fact, p. 697, R.; lines 3 and 4, p. 733, R.)

It has not procured a license to do business in Minnesota under its Foreign Corporation Act. (Ch. 200, Laws of Minnesota, 1935; Sec. 7495-1 and 7495-20, Mason's Minnesota Statutes, 1927, Vol. 3, 1938 Supp.; Ch. 303, Vol. I, Minnesota Statutes, 1941.)

In 1941 plaintiff brought this action in the District Court, Kittson County, Minnesota.

This action is a transitory action and the venue thereof was laid in the Minnesota County which was included as a part of United States Customs Collection District covered by petitioner's license.

The District Court of Minnesota, over Respondents' objection, accepted jurisdiction over this cause and over the parties thereto, tried the cause on its merits, made findings of fact and awarded judgment in favor of Petitioner and against the Respondents for the relief heretofore stated. (Ff. 2, 3, P. 696; pp. 697-718; First 4 lines p. 719 R.)

The Supreme Court of Minnesota reversed the decision and judgment of the district court and held, in effect, that petitioner as a Government licensed customhouse broker

is not an instrumentality employed to facilitate the flow of foreign commerce, that its customhouse brokerage business is local in character and not interstate commerce, and, consequently, since it was a foreign corporation without a certificate of authority to do business in Minnesota under her Foreign Corporations Act, it could not use her courts, and that the District Court was without jurisdiction. (Opinion printed in full, p. 727, R.)

The Supreme Court, in its opinion reversing the lower Court, said among other things:

> "Defendant's first assignment of error raises the question of the power of the State of Minnesota to require plaintiff, by statutory regulation, to obtain a certificate of authority before bringing an action in the courts of this state • • • (p. 732 R.)
>
> Plaintiff is a North Dakota corporation and has not complied with this requirement. The lower court found "that the customhouse brokers, involved herein, are established (fol. 735) as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada." (First Par. 733, R) • • •
>
> The broker acts as an independent contractor to perform his personal service for the shipper. He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce. (Last par. p. 738, ending on p. 739, R.)
>
> The provisions of this statute (Minn. Foreign Corporations Act) require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hard-

ship upon the business. Nor do we think that it is an obstruction upon the commerce itself, nor an interference therewith under the facts in the instant case * * * Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirment is a proper regulation for the state to prescribe, and that the constitutional power of Congress is in no way impaired thereby." (Sentences beginning in the 5th line from bottom of p. 742 and ending p. 743, R.)

This action was brought to secure a decree adjudging that the defendants should account to petitioner for the profits made on the theory that Norman G. Jensen was a constructive trustee, having breached his fiduciary duties owing to Petitioners. (Par. 9, complaint, pp. 9 to 17, R.) Under the charge of conspiracy, Curtis M. Rime was joined as a defendant. In their answer, by their objections raised at the commencement of, and during the trial, and when petitioner rested, the defendants (Respondents here) urged that the trial court was without jurisdiction because petitioner had not obtained a certificate of authority as a foreign corporation to do business in Minnesota, (Par. 1, p. 30; par. 1, pp. 41, 42; lines 3-12, p. 49; Lines 14-26, p. 626; Line 8, p. 626, R.)

Petitioner contended in the district court and in the Supreme Court that because it was a customhouse broker, licensed by the Treasury Department of the United States, and because in conducting its business it facilitated the free flow of commerce between Canada and the United States, and because its license covered part of Minnesota, it was engaged in "commerce" and therefore entitled, as a matter of law, to maintain this action in the Courts of Minnesota without going to the expense, and without submitting to the ordeal, of procuring and maintaining a license under the Minnesota Foreign Corporations Act. (Lines 3-12, p. 49; Par. 1, pp. 41, 42, R.)

The District Court of Minnesota overruled Respondents' (defendants') objections and motions and held that the petitioner was employed as an instrumentality of the United States engaged in the business of protecting the revenue of the United States, the interest of importers and facilitating the free flow of commerce. (Par. 5 of District Court Findings, pp. 698 and 699; Pars. 9 and 10 of District Courts Findings, p. 700; Par. 28, p. 713; Par. 33, pp. 716, 717).

The factual background of this action is:

On September 6, 1938, petitioner, a long established licensed customhouse broker, bought out the business of Norman G. Jensen who, at that time, had been, for about a year, doing business as a licensed individual customhouse broker. (Par. 13, p. 701; District Court's Findings of Fact, #9, 10, 11, 13 and 14, pp. 700-704, and fol. 1, p. 705, R.)

On the consummation of that purchase, Norman G. Jensen was elected to, and accepted, the offices of director, president, treasurer and manager of petitioner. On September 6, 1938, by virtue of those offices he took possession of Petitioner's business and property and continued to hold, and he professed to discharge the duties of those offices until November 5, 1940. (Findings 14, 15, and 17, pp. 702-705, and f. 1, p. 706, R.)

On July 1, 1940, the Canadian Pacific Railway which was the only carrier entering Portal, North Dakota (the home office of the petitioner) effected a change in the routing of its freight shipments from Canada into the United States, so that after July 1, 1940, 95 per cent, or more of its freight shipments, transported from Canada for Petitioner's clients, had to be "entered" through the Port of Noyes. Each of these "Ports" is within District #34. (Findings 20-24, pp. 707-710, and 1st 3 lines p. 711, R.).

Taking advantage of his advance information about this change in the routing of shipments by the C. P. R., Norman

G. Jensen followed Petitioner's business from Portal, North Dakota, to Noyes, Minnesota, while yet the president and manager of petitioner and its business, but not for his principal. He followed it to convert Petitioner's business to himself and for his own profit. The judgment of the district court, less the costs taxed in the lower court, represents the net profits found to have been realized by the Respondent for a period of 17 months next following July 1, 1940. (Finding 26, p. 712; Finding 29, pp. 714, 715, R.)

In conducting the business at Noyes, Minnesota, Norman G. Jensen used the broker's license which he possessed as one of the officers of the Petitioner. He appointed Curtis M. Rime, *his* agent, by executing in his favor, and filing with the Collector of Customs, a power of attorney authorizing Curtis M. Rime to "clear" shipments consigned to Petitioner, for *him* in his name. He provided for his agent a stamp bearing the name of Norman G. Jensen for use in effecting the alteration of the bills of lading designating the Petitioner as "broker." When the bills of lading, designating Petitioner as the broker, reached Noyes, Minnesota, or Emerson, Manitoba, they were detached from the waybills, and these carrier's certificates were substituted, on which Norman G. Jensen's name was stamped. The bills of lading consigning the shipments to Petitioner, as broker, were thus destroyed. Carrier's certificates were substituted for those bills of lading, and they were presented to the customs officials at Noyes as authority for Norman G. Jensen or his agent to "clear" these shipments originally consigned to Petitioner, as broker by the original bills of lading which had been detached and substituted with carrier's certificates. Many thousands of shipments shipped from Canada into the United States and subject to "clearance" at Noyes are involved in this action. (Last 2 lines, p. 729; p. 730 to "(fol. 732)", R.)

On the day of his resignation, November 5, 1940, Norman G. Jensen reported to the stockholders and directors that the useful and usable brokerage records of the Petitioner had disappeared.

The broker on presenting the bill of lading is authorized to "clear" shipments of merchandise through customs, and pay the duty determined by the Collector. When this has been done the shipments are released from "customs" and proceed on their journey to the ultimate consumer or consignee in the United States over the carrier which becomes the outgoing carrier.

The Tariff Act of 1930, as amended, authorizes the use of carrier's certificates where the bills of lading have been lost or so mutilated as to make the bills of lading unusable. (Exhibit "A")

The Tariff Act of 1930, as amended, and the Rules and Regulations, Exhibit "A", authorize the broker under the supervision and control of the Treasury Department to act for the shipper and the importer in "clearing" shipments of goods arriving in foreign commerce at a Port of Entry.

Each importer may appear at the Port of Entry and "Clear" the goods imported by him. ("Sec. 7, Exhibit A")

The broker, pursuant to the Tariff Act of 1930, as amended, and the Rules and Regulations "Exhibit "A" is personally liable for the duty levied against each shipment and for the payment of any additional duty which may be found to be required where the duty originally levied is insufficient or incorrectly assessed. To insure the Government against loss the broker is required to furnish one or more bonds, ranging in amount from $10,000.00 up. These bonds must be approved by the Collector before they are accepted, and are given to insure the Government against loss of duty from incorrect or insufficient assessments. (Exh. "A".)

The importer electing to "clear" his own shipments must comply with the requirements imposed on a broker before his shipment can be cleared since the Collector of Customs is by law immune from liability. (Sec. 1513 Title 19, U. S. C. A.)

The result is that the broker is relied on by the Government for protection of the public revenues and that he acts as the authorized agent in expediting the shipment of goods from Canada to importers residing in the United States. Without his services, as defined and authorized by the Tariff Act of 1930, as amended, the Port of Entry, and the yards of incoming and outgoing carriers, would become blocked for miles with freight cars filled with goods coming from Canada. The revenue of the United States would then be jeopardized, interminable delay in the movement of trains would follow if the shipments were left to depend upon the arrival of the ultimate consignee. The importer's appearance to clear his shipment at the Port of Entry might be delayed by accident, sickness and by inability to furnish the bond required by the Government.

The railroad car carrying the shipment is not permitted to leave the custody of the Collector of Customs until the shipment has been "cleared."

Fact Summary

The precise situation, then, is this:

Petitioner, a United States Customhouse Broker, duly licensed as such for customs collection district No. 34, embracing a county in Minnesota within its territory, found that its president and manager had converted its business to himself by setting up its business at the Port of Noyes when it became necessary to follow petitioner's business to that Port, due to the change in routing shipments from Canada into the United States through Noyes, instead of

Portal, North Dakota. Thereupon petitioner brought this action in district court of Kittson County, Minnesota, to secure an accounting from him and his agent.

The respondents objected that the courts of Minnesota had no jurisdiction because petitioner had not obtained a certificate of authority to do business in Minnesota under the provisions of the Minnesota Foreign Corporations Act.

The district court over-ruled these objections, decided the case on its merits and awarded judgement against the respondents, holding that petitioner was engaged in interstate commerce and facilitated the free flow of commerce between the Dominion of Canada and the United States.

On appeal to the Supreme Court of Minnesota the latter Court ruled that Petitioner's business as customhouse broker was local in character, had no substantial relation to interstate or foreign commerce, and that therefore the Court was without jurisdiction in the absence of a certificate of authority to do business in Minnesota.

The judgement awarded to Petitioner in the district court was thereupon striken down on the theory adopted and applied by the Supreme Court of Minnesota.

Therefore, the ultimate issue is:

Does the customhouse broker function as a factor or instrumentality in the administration of the tariff revenue system, enacted by Congress and executed by the Treasury Department of the United States:

Is he employed as an instrumentality to secure the protection of the revenue of the United States and to facilitate the free flow of foreign commerce, and therefore engaged in "commerce" within the purview of cl. 3, Sec. 8, Art. I of the Constitution of the United States?

If he is, and even if he is not, is he, in discharging the duties prescribed and defined by the Tariff Act of 1930,

as amended, and by the Rules and Regulations of the Treasury Department Relating to Customhouse Brokers engaged in business so closely and substantially related to foreign commerce that he is engaged in commerce, and that therefore the state cannot interfere with, nor obstruct, his activities?

Do the restrictive provisions of the Minnesota Foreign Corporations Act, as interpreted and applied in the instant case, "obstruct" or lay a burden on "commerce" within the purview of cl. 3, sec. 8, Art I of the Constitution of the United States?

III.

Jurisdictional Statement.

Petitioner relies upon the following to sustain the jurisdiction of this Court.

(a) The United States Judicial Code, Sec. 237 (b), 28 U. S. C. A. Sec. 344 (b), as amended.

(b) There is involved the validity and construction of the Minnesota Foreign Corporation Act in relation to the business of a Federally licensed Customhouse Broker, operating in U. S. Customs Collection District 34, said Act being Ch. 303 of Vol. 1, Minn. Stat. 1941, pp. 2260 to 2268; Sec's. 7495-2 to 7495-26, Vol. 3, 1938 Supp., Mason's Minn. Stat. 1927, both of which are official editions.

The material and relevant sections of the Minnesota Foreign Corporation Act, involved here, provide:

> "303.03. Foreign Corporations Must Have Certificate of Authority. No foreign corporation shall transact business in this state unless it holds a certificate of authority so to do; and no foreign corporation whose certificate of authority shall have been revoked or cancelled pursuant to the provisions of this chapter shall be entitled to obtain a certificate of authority

except in accordance with the provisions of section 303.19."

"303.06. APPLICATION FOR CERTIFICATE OF AUTHORITY. 1. CONTENTS. In order to procure a certificate of authority to transact business in this state, a foreign corporation shall make application therefor to the secretary of state, which application shall set forth:

(1) The name of the corporation and the state or country under the laws of which it is organized;

(2) If the name of the corporation does not end with the word "Corporation" or the word "Incorporated", or the abbreviation "Inc.," or does not contain the word "Company" or the abbreviation "Co." not immediately preceded by the word "and" or the character "&", then the name of the corporation with the word or abbreviation which it agrees to add thereto for use in this state;

(3) The date of its incorporation and the period of its duration;

(4) The address of its principal office in the state or country under the laws of which it is organized;

(5) The address of its proposed registered office in this state and the name of its proposed registered agent in this state;

(6) That it irrevocably consents to the service of process upon it as set forth in Section 303.13, or any amendment thereto;

(7) The names and respective addresses of its directors and officers;

(8) A statement of the aggregate number of shares having par value and of shares without par value which it shall have authority to issue, itemized by classes and series;

(9) A statement of the aggregate number of its issued or allotted shares having par value and of shares without par value, itemized by classes and series; and

(10) A statement that the officers executing the application have been duly authorized so to do by the Board of Directors of the corporation * * *."

"303.07. INITIAL LICENSE FEE. At the time of making application for a certificate of authority the foreign corporation making such application shall pay to the state treasurer the sum of $50.00 as an initial license fee."

"303.10. OFFICE AND AGENT.

Subdivision 1. MAINTENANCE. Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

(1) A registered office which shall be in a county where it has its principal place of business in this state or, if it has no place of business in this state, then in any county where it does or proposes to do business;

(2) A registered agent, which agent may be either an individaul, resident in this state, whose business office is identical with such registered office, or a corporation having a business office identical with such registered office * * *."

"303.14. ANNUAL REPORT. Subdivision 1. Filed with the Secretary of state; contents. Between January first and April first, in each year, every foreign corporation which holds a certificate of authority shall make and file with the secretary of state a report for the next preceding calendar year, setting forth:

(1) The name of the corporation and the state or country under the laws of which it is organized;

(2) If the name of the corporation does not end with the word "Corporation" or the word "Incorporated," or the abbreviation "Inc.", or does not contain the word "Company" or the abbreviation "Co." not immediately preceded by the word "and" or the character "&", then the name of the corporation with the word or abbreviation which it has agreed to add thereto for use in this state;

(3) The date of its incorporation and the period of its duration;

(4) The address of its principal office in the state or country under the laws of which it is organized;

(5) The address of its registered office in this state and the name of its registered agent at such address;

(6) The names and respective addresses of its directors and officers;

(7) A statement of the aggregate number of shares having par value and of shares without par value which it has authority to issue, itemized by classes and series;

(8) A statement of the aggregate number of its issued or allotted shares having par value and of shares without par value, itemized by classes and series;

(9) A statement expressing in dollars the value of all the property owned by the corporation, wherever located, and the value of all its property located within this state;

(10) A statement expressing in dollars the gross receipts of the corporation in such calendar year derived from its business operations wherever transacted, and the gross receipts of the corporation in such calendar year derived from its business operations transacted, in whole or in part, within this state; and

(11) Such additional information as may be necessary or appropriate to enable the secretary of state to determine the additional license fee, if any, payable by such corporation.

The information required by clauses (7) to (9) of this subdivision shall be given as of the close of the next preceding calendar year * * *."

"303.20. FOREIGN CORPORATION MAY NOT MAINTAIN ACTION UNLESS LICENSED. No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action in any

court in this state until such corporation shall have obtained a certificate of authority; nor shall an action be maintained in any court by any successor or assignee of such corporation on any right, claim, or demand arising out of the transaction of business by such corporation in this state until a certificate of authority to transact business in this state shall have been obtained by such corporation or by a corporation which has acquired all, or substantially all, of its assets. If such assignee shall be a purchaser without actual notice of such violation by the corporation, recovery may be had to an amount not greater than the purchase price. This section shall not be construed to alter the rules applicable to a holder in due course of a negotiable instrument.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state does not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action in any court of this state.

Any foreign corporation which transacts business in this state without a certificate of authority shall forfeit and pay to this state a penalty, not exceeding $1,000, and an additional penalty, not exceeding $100.00 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority therefor. Such penalties may be recovered in the district court of any county in which such foreign corporation has done business or has property or has a place of business, by an action, in the name of the state, brought by the attorney general."

"303.21. FEES. The secretary of state shall charge and receive the following fees for the following services:

(1) For filing an application for a certificate of authority, $5.00;

(2) For filing an annual report, $5.00;

(3) For filing articles of amendment or an instrument evidencing a reduction of stated capital, or a merger or consolidation, $2.00;

(4) For filing application for withdrawal and final report, $5.00;

(5) For filing a change of address of registered office or revocation or change of appointment of a registered agent, $1.00;

(6) For filing an application for reinstatement of a certificate of authority, $5.00;

(7) For issuing any certificate pursuant to the provisions of this chapter, $2.00.

In addition thereto, in each instance in which he is required by this chapter to transmit a certificate to a register of deeds for record, the secretary of state shall charge and receive $1.00 for recording such certificate with the register of deeds."

The Minnesota Foreign Corporation Act was originally adopted as the "Somerville Law", Ch. 69, Laws of Minnesota, 1899. This statute was construed by the Supreme Court of Minnesota in 1904 in the case of *Rock Island Plow Company* v. *Peterson*, 93 Minn. 356, 359, 191 N. W. 616. In that case the Supreme Court of Minnesota said:

"This statute was not intended to interfere with interstate commerce, for it is beyond the power of the legislature to enact laws prohibiting *or restricting* parties engaged in that sort of business. But was intended to apply exclusively to foreign corporations doing business within our borders, as distinguished from interstate commerce." (Italics supplied.)

The rule established in that case was followed by the Supreme Court of Minnesota in the following cases:

Victor Talking Machine Co. v. *Lucker*, 128 Minn. 171, 150 N. W. 790.

Thomas Mfg. Co. v. *Knapp*, 101 Minn. 432, 112 N. W. 989.

Defender Auto Lock Co. v. *Schmelzel Co.*, 157 Minn. 285, 196 N. W. 263.

(c) There is involved the construction and application of the Act of Congress authorizing the President of the United States to establish customs collection district No. 34, known as "District of Dakota" and which includes and embraces all of the States of North Dakota, South Dakota and the County of Kittson in the State of Minnesota, lying north of the 46th degree of north latitude (Vol. 6-a, F. C. A., 19 U. S. C. A., Sec 2).

(d) There is involved the construction of Tariff Act of 1930, Sec. 641, 19 U. S. C. A., Sec. 1641 (a) and (d); Title IV, p. 481, 46 Stat. 719, Sec. 1481, Title 19, U. S. C. A.; Title IV, p. 482, 46 Stat. 720, Sec. 1482, Title 19, U. S. C. A.; Title IV, p. 483, 46 Stat. 721, Sec. 1483, Title 19, U. S. C. A.; Title IV, p. 484, 46 Stat. 722, Sec. 1484, Title 19, U. S. C. A.; Title IV, p. 485, 46 Stat. 724, Sec. 1485, Title 19, U. S. C. A.; Title IV, p. 490, 46 Stat. 726, Sec. 1490, Title 19, U. S. C. A.; Title IV, p. 505, 46 Stat. 732, Sec. 1505, Title 19, U. S. C. A. as amended.

(e) There is involved the construction and validity of "Rules and Regulations Relating to Customhouse Brokers" issued by the United States Treasury Department, Office of the Secretary, Washington, April 16, 1936, Department Circular No. 559, (Filed with the Division of the Federal Register, April 20, 1936, 9:48 a. m.) as amended.

The parts of said Rules and Regulations here material provide:

> "By virtue of and pursuant to the authority vested in me, including the authority conferred by section 641 of the Tariff Act of 1930, as amended, the following regulations are hereby promulgated: Sec. 1, LICENSES

FOR BROKERS REQUIRED—QUALIFICATIONS—REGULATIONS AUTHORIZED—(a) Triff Act of 1930, section 641 (a), as amended:

• • • Except as provided in subdivision (c) of this section, no person shall transact business as a customhouse broker without a license granted in accordance with the provisions of this subdivision, but nothing in this section shall be construed to authorize the requiring of a license in the case of any person transacting at a customhouse business pertaining to his own importations. (Aug. 26, 1935, Ch. 689, sec. 3, 49 Stat. 864) (19 U. S. C. A., Sec. 1641 (a)).

(b) No representative of the Treasury Department shall recognize or deal with any person transacting the business of a customhouse broker, or any employee, officer, or agent thereof, unless such person is licensed as a customhouse broker in accordance with the provisions of these regulations.

(c) Tariff Act of 130, section 641 (a); (19 U. S. C. A., Sec. 1641 (a)): The Secretary of the Treasury may prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations, associations, and partnerships, and may require as a condition to the granting of any license, the showing of such facts as he may deem advisable as to the qualifications of the applicant to render valuable service to importers and exporters. No such license shall be granted to any corporation, association, or partnership unless licenses as customhouse brokers have been issued to at least two of the officers of such corporation or association, or two of the members of such partnership, and such licenses are in force. • • •

(d) Tariff Act of 1930, section 641 (d), 19 U. S. C. A. Sec. 1641 (d), as amended:

The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States,

and to carry out the provisions of this section . . .
(Aug. 26, 1935, ch. 689, sec. 4, 49 Stat. 865)

Sec. 2. DEFINITIONS—When used in these regulations —(a) CUSTOMHOUSE BROKER—The term "customhouse broker" includes any person who, acting on behalf of others, transacts customs business not limited to a kind described in section 7 of these regulations.

(b) TREASURY DEPARTMENT OR ANY REPRESENTATIVE THEREOF—The term "Treasury Department or any representative thereof" includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office or unit.

(d) PERSON,—The word "person" includes corporations, associations, and partnerships.

(e) BOOKS AND PAPERS—The term "books and papers" includes all books, accounts, records, papers, documents, and correspondence of a customhouse broker relating to his customs business.

Sec. 3. APPLICATION FOR LICENSE AND INVESTIGATION OF APPLICATION—(a) A person desiring to engage in the business of a customhouse broker shall submit an application to the Committee, stating his qualifications for a license. The application shall be under oath and in such standard form as the Committee, with the approval of the Secretary, shall have prescribed,

(d) . . . In the case of a corporation, association, or partnership, the application will be rejected by the Committee unless it appears that the officers or members who are licensed customhouse brokers are to exercise responsible supervision and control of the transaction of the customs business of such corporation, association, or partnership. An individual who is unable for any reason to take the oath of allegiance and to support the Constitution of the United States shall not be licensed . . .

Sec. 4. ISSUANCE OR DENIAL OF LICENSE—(a) If the Committee finds that the applicant is qualified, the Committee will issue a license in such standard form as the Committee, with the approval of the Secretary of the Treasury, shall have prescribed. The license shall be forwarded to the appropriate collector of customs, who shall deliver it to the licensee after making a record thereof in a roster of licensed brokers which shall be maintained in the customhouse in such manner that it will be readily accessible to the proper customs officers and employees.

Sec. 8. BOOKS AND PAPERS—(a) Tariff Act of 1930, section 641 (d), as amended:

The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section, including rules and regulations requiring the keeping of books, accounts, and records by customhouse brokers, and the inspection thereof, and of their papers, documents, and correspondence by, and the furnishing by them of information relating to their business to, any duly accredited agent of the United States. (Aug. 26, 1935, ch. 689, sec. 4, 49 Stat. 865.)

(b) Each licensed customhouse broker shall maintain correctly and in orderly itemized manner, and keep current, records of account reflecting all his financial transactions as a customhouse broker. He shall keep and maintain on file a copy of each entry made by him, and copies of all his correspondence and other papers relating to his customs business.

(g) All of the books and papers required by the foregoing provisions of this section shall be kept on file for at least five years and maintained in such manner that they may readily be examined. Any or all of such books and papers shall be made available to duly accredited agents of the United States on demand therefor, within five years after their preparation or receipt

by the broker, or within such longer period of time during which they remain in the possession of the broker. The broker shall also furnish such additional information regarding his activities as a licensed customhouse broker as such agents may require.

Sec. 9. Other Duties and Obligations of Licensed Customhouse Brokers—(a) The duties and obligations specified in this section and elsewhere in these regulations relating to customhouse brokers are not to be construed as exclusive, since the Secretary of the Treasury may deem conduct not within the purview of any specification in these regulations to be such as would also warrant the suspension or revocation of a license under the authority conferred upon him by section 641 of the Tariff Act of 1930, as amended.

(b) No licensed customhouse broker shall permit his license or his name to be used by or for any unlicensed person, or by or for any broker whose license is under suspension, in the solicitation, promotion, or performance of any customs business or transaction.

(c) No licensed customhouse broker shall accept or retain employment from or with an unlicensed employer to transact customs business for others than the employer in such manner that the fees or other benefits resulting from the services rendered by the licensed broker for others inure to the benefit of the unlicensed employer.

(i) No licensed customhouse broker shall suggest to a client or a prospective client a plan known to be illegal for evading payment of any duty, tax, or other debt or obligation owing to the Government.

(m) Each licensed customhouse broker shall promptly pay over to the Government when due all sums received for the payment of any duty, tax, or other debt or obligation owing to the Government, and shall promptly account to clients for funds received for them from the Government, or received from a client in excess of the

governmental or other charges properly payable in respect of the client's customs business.

(q) Each licensed customhouse broker shall exercise due diligence in answering correspondence, in making financial settlements, and in preparing or assisting in the preparation of, and filing documents, affidavits, and other papers relating to any matter handled by him as a customhouse broker.

Sec. 11. CANCELLATION OF LICENSES—(a) Tariff Act of 1930, section 641 (a): * * * Any license granted to any such corporation, association, or partnership shall be deemed revoked if for any continuous period of more than sixty days after the issuance of such license there are not at least two officers of such corporation or association or two members of such partnership who are qualified to transact business as customhouse brokers * * *

(c) A customhouse broker's license may be cancelled upon written application to the Committee and surrender of the license certificate, but before granting the request, inquiry shall be made by the Committee to ascertain whether it has been made in order to evade proceedings for revocation or suspension of the license, in which event the request shall be denied, unless the Secretary of the Treasury shall otherwise order.

(f) The federal questions sought to be reviewed were raised below in the following manner and by the methods following:

1. By answer to petitioner's complaint, (Par. 1, P. 30 R) which reads as follows:

"Comes now the defendant, Norman G. Jensen, and for his separate answer to plaintiff's first cause of action alleges and shows to the court:

1. Admits the allegations of Paragraph I of plaintiff's first cause of action, but in that relation this

defendant states that he is informed and believes, and therefore, states the fact to be, that the plaintiff corporation is not now, and never has been, authorized to transact business within the State of Minnesota as a foreign corporation."

2. By petitioner's reply to the answers, (Par. 1, pp. 41 and 42, R) which reads as follows:

"For its reply to the separate answer of the defendant Norman G. Jensen, plaintiff alleges:

I

With reference to paragraph I, it alleges that it has at all times been a corporation, organized and empowered to transact business as a customhouse broker within Customs District #34 of the United States of America, and said district embraces within its boundaries a part of the State of North Dakota and that part of the State of Minnesota, in which Noyes is located. That its license as a customhouse broker is now, and has been, during all times herein involved effective for and throughout said Customs District #34. That the defendants and each of them, have at all times herein involved known and appreciated that the plaintiff has been at all times authorized to do business as a customhouse broker throughout said District No. 34"

3. At the commencement of the trial in the district court of Minnesota for Kittson County, the defendants (respondents here) objected and questioned "the authority of this corporation (petitioner) —— a North Dakota corporation, to sue in the courts of Minnesota by reason of their failure to procure a certificate of authority under the foreign corporation statute of this (Minnesota) state. * * * "

Counsel for petitioner replied to said objection and said:

"I think it may be conceded that the plaintiff corporation has not secured a certificate of authority to do

business in this State. The position of the plaintiff is this, your Honor, that the statute in question does not apply to the plaintiff corporation for the reason that the plaintiff is engaged in interstate commerce and that the statute is not intended to apply to corporations such as this plaintiff." (P. 49, R., lines 3 to 12)

Thereupon the presiding Judge ruled:

"Well, the question is sufficiently doubtful so that I shall reserve the ruling on it at this time and you may proceed with the evidence." (P. 49, lines 14 to 17, R.)

4. On the conclusion of the introduction of evidence by petitioner, counsel for defendants (respondents here) moved the trial court for an order dismissing petitioner's cause of action on the ground that without a certificate of authority issued pursuant to the Minnesota Foreign Corporation Act petitioner was not entitled to sue in the courts of Minnesota. The trial court denied the motion (Pp. 625 and 626 R), and the proceedings had as aforesaid read:

"• • • Plaintiff rests.

Mr. Murphy: Plaintiff having rested, the defendants move that this action be dismissed on the following grounds:

First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws of the State of Minnesota and is not entitled to sue in the State of Minnesota; • • • (Lines 14 to 26, P. 626 R.)

The Court: The motion will be denied." (Line 8, P. 626 R.)

5. After the case had been submitted to the trial court on the evidence and briefs submitted by petitioner and the

defendants (respondents) the trial court ruled that petitioner could maintain this action in Minnesota notwithstanding the absence of a certificate of authority, and contrary to the contention of the defendants. The facts found by the trial court on that point are stated thus:

> "That the principal function of customhouse brokers, as far as herein concerned, is that of making entry of shipments of goods entering the United States from the Dominion of Canada, paying the customs duty imposed on such shipments, and clearing the same so that they may continue on their course to their ultimate destination with the least possible loss of time; that in making entry shipments are consigned on bills of lading by the shipper to the customhouse broker chosen by such shipper; that a copy of such bill of lading is thereafter delivered to the broker by the carrier or mailed directly to him by the shipper; that upon receipt of such bill of lading by the broker the same is presented to the collector of customs and thereupon the duty due the United States is determined by the collector of customs and paid by the broker, whereupon the shipment is cleared and permitted to proceed to its ultimate destination and consignee; that the customhouse broker, so acting, is considered, for the purpose of making such entry, the actual consignee and acts as the agent of the shipper in making such entry; that in clearing said shipments he aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States; that the customhouse brokers involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada." (Par. 5, Pp. 698 and 699 R.)

The trial court ordered judgment in favor of petitioner and against the defendants, and pursuant to said order for

judgment, judgment was entered in this cause in said district court on August 20, 1942. (Fol. 3, P. 721, pp. 722 and 723, and Fol. 1, P. 724 R.)

Defendants (respondents) appealed from said judgment to the Supreme Court of Minnesota on August 21, 1942, and on said appeal assigned the foregoing findings of the trial court as error. The material assignments of error are in words and figures as follows:

I.

"Assignments of Error.

"The findings of fact, conclusions of law, and judgment are contrary to law, in the particulars following:

(a) The Court erred in holding as a matter of law (part of its Finding 5, R. p. 699, f. 1):

'* * * that the customhouse broker, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada.'" * * *

(d) The Court erred, as a matter of law, in denying defendants' motion for dismissal of action (exceptions allowed as to all adverse rulings R. p. 288, ff. 1, 2) made upon the conclusion of plaintiff's case (R. p. 625, ff. 2, 3; R. pp. 626, f. 1) as follows:

"Mr. Murphy: Plaintiff having rested, the defendants move that this action be dismissed on the following grounds: First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws to the State of Minnesota and is not entitled to sue in the State of Minnesota; second, on the ground that the evidence wholly fails to prove or

sustain any of the allegations contained in the plaintiff's complaint; third, we move to dismiss as to the defendant Rime as there is absolutely no evidence in this case which in any way tends to prove or sustain any allegations as to him, it appearing from the record that he never at any time had been affiliated with or employed by or connected with the plaintiff company and was under no obligation or duty of any kind with respect to the same. I want to make that motion for the record at this time."

The other assignments of error assigned by respondents in the Supreme Court of Minnesota are found at pages 754 to 757 down to "certificate" R.

6. The Supreme Court of Minnesota by its opinion dated May 14, 1943, reversed the district court for Kittson County, Minnesota, and held that petitioner could not maintain its said cause of action in the courts of Minnesota without a certificate of authority.

The opinion of the Supreme Court of Minnesota has not been published in the official Minnesota Reports, but is found at p. 721 in Vol. 9, N. W. R. (2nd).

(g) The date of the opinion of the Supreme Court of Minnesota is May 14, 1943.

(h) The date of the judgment entered in the Supreme Court of Minnesota pursuant to said opinion is May 25, 1943.

(i) The Supreme Court of Minnesota is the highest court and the court of last resort in the State of Minnesota. (Sec. 1, Article VI, Constitution of Minnesota; Sec's. 9068 and 9069, Volume 6, Dunnell's Minnesota Digest, Second Edition.)

IV.

Reasons Relied Upon for Allowance of Writ.

1. The decision of the Supreme Court of Minnesota has caused Petitioner great and irreparable injury.

The decision of the district court of Minnesota, supported by incontestible documentary evidence, admissions of the Respondents, and by other credible evidence, ripened into a judgment in favor of Petitioner and against the Respondents whereby Petitioner was awarded damages in the sum of $10324.80, payable immediately and additional relief in the estimated amount of $2500.00 in the form of commissions due on rebates or refunds and of the surrender to Petitioner by the Respondents of usable and useful customhouse brokerage records. By the reversal of that judgment Petitioner is deprived of all that poroperty and in practice, rendered remediless, unless the decision of the Supreme Court of Minnesota is reversed and the judgment of the district court re-instated.

2. Careful investigation and research compel the belief that this is the first case in which this Court has had directly before it the construction of section 1641, Title 19, U. S. C. A., as amended, and the Rules and Regulations of the Treasury Department Relating to Customhouse Brokers, promulgated by the Secretary of the Treasury pursuant to the Tariff Act, as amended, which define the duties and functions of customhouse brokers, their relation to the tariff revenue system of the United States, and to foreign commerce.

3. This appears to be the first case in which this Court, or other United States Courts, have had directly before them for construction the question of whether or not a customhouse broker is an instrumentality, provided for by Congress, employed to protect the national revenue, the im-

porters, and aid in the free flow of commerce between foreign nations and the United States.

4. This also appears to be the first case in which the courts have had directly before them the question of whether or not the business of a customhouse broker is interstate commerce, and if so, if it is "interfered with", or "burdened" by such restrictive requirements as those imposed by the Minnesota Foreign Corporations Act, and used in this case to deny Petitioner access to the courts of Minnesota.

5. This case is of the utmost importance to the Federal Government, and particularly to the Department of the Treasury. The decision of the Supreme Court of Minnesota, if it be allowed to become a precedent, affects, at least indirectly, the efficient control by the United States over the customhouse brokers and the customs collections in all of the 48 customs collection districts at the 307 ports of entry because if the services required of a customhouse broker do not help to protect importers, the revenue of the United States, and facilitate the free flow of commerce between the United States and the Dominion of Canada, the Treasury Department has lost effective control of the instrumentality, authorized by Congress, and heretofore relied on by the Federal government as one of the efficient means for protecting the public revenue and foreign commerce. Thus, this case is a test case which, while of great importance to Petitioner, is of the utmost importance to the customhouse brokers generally and the Government of the United States in particular.

6. This decision of the Supreme Court of Minnesota appears to be in direct conflict with its own prior decisions on the subject of what constitutes "commerce", and what constitutes a "burden" or "obstruction" to interstate and foreign commerce.

7. The decision of the Supreme Court of Minnesota probably conflicts with the decisions of this Court defining "commerce" with foreign nations.

8. The decision of the Supreme Court of Minnesota recognizes that there is involved in this case an important question of Federal law not heretofore ruled on by this Court. This important question of Federal law should be settled by this Court.

9. The decision of the Supreme Court of Minnesota challenges the effectiveness of a license issued by the Federal government and denies its validity and the authority ostensibly conferred thereby on the licensee in a district embracing within its area more than one state because this decision denies to petitioner the privilege and the right to appeal to the courts of Minnesota for the protection of its property in that part of the district which lies in Minnesota.

10. If this decision of the Supreme Court of Minnesota becomes a precedent, an incorporated customhouse broker will necessarily be forced to suffer the burden of qualifying, and keeping qualified, as a foreign corporation in every State of the Union in order that it may protect its property and serve the Government as required by the Laws and Regulations of the Government, for, if Minnesota can exclude from her courts such a customhouse broker on the ground it is without a certificate of authority to do business in the State, then South Dakota, North Dakota and all the other states can do likewise. Failure to comply with such regulations will not only deprive such a customhouse broker of its property but subject it to the severe penalties prescribed by that act.

11. The decision of the Supreme Court of Minnesota indicates that it is probably the result of a confused concept

of the problem involved in the case, and that, but for this confusion, the result would have been different. On p. 737, R., the last complete paragraph thereof, the Court says:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff *in a substantial way interfere with or obstruct the exercise of the granted power of Congress to regulate interstate commerce.*"

Then, beginning with the last paragraph on p. 738, R., 4th line from the bottom of the page, to the end of that paragraph on p. 739, R. the Court says:

> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, *it seems to us that the statutory requirement is not an obstruction or interference with Interstate commerce.*" (Italics supplied)

This apparent conflict in the understanding of the problem probably accounts for deciding an important question of Federal law in a way apparently in conflict with applicable decisions of this Court.

12. It is submitted that the public interest will be promoted by a prompt settlement in this Court of the questions involved which are vital and important to the Government of the United States, to all customhouse brokers and to Petitioner.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of your Honorable Court directed to the Chief Justice and the Justices of the Supreme Court of the State of Minne-

sota, commanding the Supreme Court of Minnesota and the Justices thereof to certify and send to this Court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its Docket 33388, Union Brokerage Company, a corporation, Plaintiff-Respondent *v.* Norman G. Jensen and Curtis M. Rime, Defendant-Appellants, and that the opinion and judgment of the Supreme Court of Minnesota be reviewed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just and your Petitioner will forever pray.

LEONARD ERIKSSON,
JAMES S. ERIKSSON,
Counsel for Petitioner,
23-25 Manhattan Building,
Fergus Falls, Minn.

LEWIS L. DRILL,
Of Counsel.

Dated: August 10, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

BRIEF IN SUPPORT OF THE PETITION.

I.

Opinion Below.

The opinion of the Supreme Court of Minnesota is as yet unreported in the official Minnesota Reports, but it is published in 9 N. W. R. (2), p. 721 and is set forth verbatim in the record beginning at page 727.

II.

Jurisdiction.

A statement as to the jurisdiction of the Supreme Court of the United States is set forth in the petition.

III.

Statement.

A statement of the facts, the questions presented and the reasons relied upon for the issuance of the writ will be found in the petition.

IV.

Argument.

The tariff revenue system of the United States as established by the Tariff Act of 1930, as amended, (19 U. S. C. A.), authorizes the Secretary of the Treasury "to prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character and of corporations, associations, and partnerships, and provides; subject to certain qualifications (not here material), that no person shall transact business as a customhouse broker without a license granted in accordance with the provisions of such statute." Par. 89, Customs Duties, 25 C. J. S., p. 248.

Petitioner is and has been, since 1928 at least, such licensed customhouse broker for United States Customs Collection District #34.

Shipments of merchandise from Canada arriving at a Port of Entry in the United States, can go no further until released from "customs," and to get released an "entry" must be made in accordance with Government regulations. These "entries" are made by the customhouse broker because he is the "consignee" or the importer of the shipment for purposes of clearance. As such he is responsible to the Government for the payment of the duty assessed, excepting certain situations not here material.

The theory behind this arrangement is stated in Sec. 97, "Customs Duties", 25 C. J. S. p. 254 in this language:

> "In order to prevent frauds on the revenue through collusive transfers, and to save the government the

trouble and inconvenience of hunting up the ultimate consignee, it has from the earliest acts been provided that an importation shall, for the purposes of the tariff acts, be deemed and held to be the property of the person to whom the same is consigned, unless the consignment is unauthorized, even though the holder is but a customhouse broker or a forwarder."

The customhouse broker is licensed by the Government to hold himself out generally in matters of trade, commerce and navigation for the protection of the revenue of the United States and for the welfare of the importers. The duration of this right to do business as a customhouse broker is subject to the right of revocation by the Secretary of the Treasury, who, however, must act in accordance with established rules in revoking a license once granted.

This, generally speaking, is and has been the nature of petitioner's business and activities. Its business activities are therefore intimately interwoven with the nation's foreign commerce. As customhouse broker, Petitioner receives shipments from Canada destined for some point in the United States at the Port of Entry, gets them inspected by the Collector of Customs, gets the duty assessed, and paid, the shipments released from the Collector's custody, and gets them released for transportation by carrier to the ultimate consignee.

Petitioner maintains that this business, and the duties connected therewith, is "commerce" within the purview of cl. 3, sec. 8, Art. I of the Constitution of the United States, and that the control thereof rests exclusively in Congress.

The law is settled that states cannot exercise control over interstate or foreign commerce "without the assent of Congress."

Leisy v. *Hardin*, 135 U. S. 100, 119, 34 L. ed. 128, 136,

Brown v. *Maryland*, 12 Wheat. at 419, 6 L. ed. 678, 688.

The power of Congress over foreign and interstate commerce tolerates no encroachments by the State.

Pensacola Telegraph Co. v. *Western Union Tel. Co.*, 96 U. S. 1; 24 L. ed. 708, 710.

In the instant case the merchandise, transported from Canada arrives at the Port of Entry subject to inspection and "clearance" of customs. It did and could not, come to rest, or become commingled with the property of the State, until the services of the Petitioner as customhouse broker had been prformed and until that service was performed the Federal power protected the business and commerce. These services are essentially an adjunct to the system of importations and foreign commerce. In such situations "the strong arm of the government may be put forth to brush away all obstructions to the freedom of interstate commerce or the mails."

In re Debs, 158 U. S. 564, 39 L. ed. 1092, 1102.

The United States has property in the goods imported from Canada reaching a Port for clearance, namely the appropriate duty. That property of the United States is realized and appropriated through the services rendered by the licensed customhouse broker.

It is true, of course, that the broker has no physical contract with the shipments at the place of their origin. That is, he does not furnish the goods; he does not load the goods onto the freight cars, and he does not procure the bills of lading or the waybills at the point of origin; but the exporter and the importer, jointly or severally, designate him as the consignee in the bill of lading and without his services these shipments cannot get out of the Port of Entry to proceed to their ultimate destination. His compensation, it is also true, is not paid by the United States. That is no criterion. However, the same source from which the duty due the United States is paid is the source of his compensa-

tion. The merchandise, moving in foreign commerce, yields his fee just as it yields the duty to the Government.

Assuming, then, that the broker's business is so related to commerce with foreign nations as to be subject to control by Congress, the question arises:

Are the restrictive provisions of the Minnesota Foreign Corporations Act a "burden" on, or an "interference with" commerce which cannot be tolerated.

> "'Burden' means anything that imposes therewith a restrictive or onerous load upon such commerce."
>
> *State of Missouri* v. *Kansas Natural Gas Co.*, 282 Fed. 341, 345.

> "A corporation of the state may go into another for all legitimate purposes of interstate commerce without the leave of the latter state, and any statute of such state obstructing or laying a burden on the exercise of such privilege is void under the commerce clause."
>
> *Dahnke-Walker Milling Co.* v. *Bondurant*, 42 S. ct. 106, 257 U. S. 282, 66 L. ed. 239, reversing 215 S. W. 76, 185 Ky. 386.

This Dahnke-Walker Milling Company case is quite amalgous to this instant case because there, as here, the defense interposed was to the effect

> "that the plaintiff had not complied, as was the fact, with the Statute of Kentucky (Ky. Stat. 1915, Par. 571) prescribing the conditions on which corporations of other states might do business in that state and that the contract was therefore not enforcible. To this the plaintiff replied that the only business done by it in Kentucky consisted in purchasing wheat and other grain in that state for immediate shipment to its Tennessee mill and then shipping the same there; that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars; that this transaction was interstate commerce and as

to it the statute of Kentucky, whose application was involved by the defendant, was invalid because in conflict with commerce clause of the Constitution of the United States."

In the instant case the only business done by petitioner in Minnesota consisted in "clearing" importations from Canada into the United States and paying or assuming the liability for paying the duty on those importations to the Government of the United States.

In the case of *Furst* v. *Brewster*, 282 U. S. 493, 75 L. ed. 478, 481, the court says:

> "Such commerce comprehends all the component parts of commercial intercourse between different States, and according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause. (Several citations). Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose. (Citations.)

See also:

Butler Bros. Shoe Co. v. *U. S. Rubber Co.*, 156 Fed. 1; 84 C. C. A. 167, certiorari denied, 212 U. S. 577, 53 35 L. ed. 649.

Lemke v. *Farmers Grain Co. of Embden*, 42 S. Ct. 244, 258 U. S. 50, 66 L. ed. 458, 464.

Puget Sound Stevedoring Co. v. *Tax Commission of State of Washington*, 58 S. Ct. 72, 302 U. S. 90, 82 L. ed. 68, modifying 63 P. (2) 532, 189 Was. 131.

"Commerce" as used in cl. 3, sec. 8, Art. I of the Constitution of the United States is not limited to the sale or ex-

change of commodities, but includes all the acts, instrumentalities, and dealings that directly bring about the sale or exchange of goods and "the control of importation does not rest with the State but with the Congress."

Brown v. *State of Maryland*, supra.
Board of Trustees of University of Illinois, U. S. 53 S. Ct. 509, 289 U. S. 48, 77 L. ed. 1025, 1029.

The restrictive provisions of the Minnesota Foreign Corporations Act do burden interstate and foreign commerce. First, we have the provision that no foreign corporation may maintain an action in the State until it shall have obtained a certificate of authority by complying with its provisions.

Next, this statute provides a penalty of $1000.00 and an additional penalty of $100.00 for each month or fraction thereof during which such corporation shall continue to transact business in Minnesota without a certificate. The application for the license or certificate of authority specify 10 requisites, and at the time of making the application, an initial fee of $50.00 must be paid. A registered office and a registered agent must be provided for, and annually between January 1 and April 1 reports, as defined, must be made and filed with the Secretary of State.

Obviously a corporation, such as petitioner, believing it to be aiding the nation's foreign commerce, and the collection of its revenue, may do business for several years in the belief that it is not amenable to this Act as was the case here. As a result thousands of dollars in penalties may accrue to become a sudden and destructive liability.

Other states have similar provisions.

The business of the broker extends into every State of the Union because shipments from Canada are bought by persons in every State.

Petitioner believes it is protected from this burden, and respectfully represents that the following decisions apply:

Crutcher v. *Commonwealth of Kentucky*, 141 U. S. 47, 35 L. ed. 649.

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 59 L. ed. 193.

Petitioner's business and activities are intimately related to and a part of the nation's foreign commerce.

Stafford v. *Wallace*, 258 U. S. 495, 66 L. ed. 735 applies.

Under the Minnesota decision, if allowed to become a precedent, Petitioner, and any other broker organized as a corporation, would have to qualify, and keep qualified, in all of the States in order that it might protect its property.

To illustrate:

One day the broker "clears" a shipment of lumber originating in British Columbia, and destined for Minneapolis. He relies on the financial standing of the importer and advances the duty required by the Collector. The sum advanced is $500.00.

The next day he clears a shipment of seed for an importer domiciled in Chicago, and again advances the duty in the amount of $1500.00.

It is immaterial, of course, whether he originally advances it or not because he is liable for any error committed, and if an error is discovered the next month or the next 5 years, he is required to pay, as the Collector is immune.

The importer either does not understand, or he is slow, so that the broker must pay or suffer liability under his bond.

He finds himself unable to collect within the time allowed or without bringing an action. The amount advanced is insufficient for suit in the District Court of the United States. Under the Minnesota decision, if allowed to become a precedent, he must qualify in each of those States, or be compelled to suffer the loss.

It is therefore respectfully submitted that the provisions of the Minnesota Foreign Corporations Act is a burden and an interference with "commerce."

The respondents admitted the interstate or foreign commerce feature of the broker's business. Norman G. Jensen testified:

> "Q. And so to make this attempted investigation clear and simple, a customhouse broker is rendering services to both the government of the United States and the importer, isn't that right?
>
> A. That is right.
>
> Q. And that is all his business?
>
> A. No, he renders service to exporters.
>
> Q. All right, we'll add that to it—is that all of his services?
>
> A. It is all I can think of right now." (F. 1, p. 65. R.)

Mr. Phillips, cashier of the Soo and Great Northern Railways at the Port of Noyes, testified:

> "Q. When goods come from across the border, subject to entry here in the United States, what is done by the railway or by you?
>
> A. The papers are stripped, that is, the bill of lading and invoices and other papers. * * *
>
> The papers that the—that accompany the shipment to be delivered to the customs broker. * * *
>
> The papers are usually attached to the way-bill for the car. The way-bill is the instructions to the railroad for the conductor handling the car.
>
> Q. And when a car containing a shipment of merchandise into the United States from abroad—what is done with those papers?
>
> A. They are delivered to the customs broker to whom they are consigned. * * *
>
> If the bills of lading fail to show a broker consignee the car is refused, and the station personnel notify "the connecting line * * * or the line that delivered it to the railroad line on this side of the boundary." (Ff. 1, 2, p. 383, 384, 385 R.)

Mr. Mackey testified that the Collector

> "Doesn't deliver the bills of lading (to the broker); he delivers one copy of the invoice and a note on the back in some way that he has authority to clear that shipment, then the inspector goes out and makes an inspection of the shipment and the shipment is released, and, as far as the railroad is concerned, it goes forward." (Ff. 2, 3, p. 575, R.)

Conclusion.

Upon these facts and authorities it appears that the Supreme Court of Minnesota committed error by reversing the judgment of the district court and by holding that the Petitioner is not engaged in interstate commerce nor an instrumentality employed to protect the revenue of the United States and to aid in the free flow of foreign commerce.

The decision of the Supreme Court of Minnesota is contrary to the applicable decisions of this Court.

The decision of the Supreme Court of Minnesota has caused Petitioner irreparable injury.

The case at bar is of vital importance not only to Petitioner, but also to all other customhouse brokers and to the Government of the United States.

The decision of the Supreme Court of Minnesota is erroneous and should be reversed.

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Dated: August 10, 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITIONER'S REPLY BRIEF.

LEONARD ERIKSSON,
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LEWIS L. DRILL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME.

PETITIONER'S REPLY BRIEF.

I.

Respondent questions the seven points raised by Petitioner.

While it is true that the fundamental question in this case is: "Was, and is, the petitioner, a North Dakota Corporation, whose business is that of a duly licensed custom-house broker for U. S. Customs Collection District 34, aiding and facilitating the free flow of commerce, and therefore engaged in 'commerce', within the purview of cl. 3, Sec. 6, Art. I of the Constitution of the United States" yet, that question presents and involves at least each of the seven phases raised by Petitioner.

Here we have a North Dakota corporation, Federally licensed by authority of the Congress, exercising the privi-

lege of carrying on as its business the clearing of shipments of goods moving in foreign commerce between the Dominion of Canada and the United States. That privilege and business is carried on in a district, which includes within its boundaries, one of the counties of the State of Minnesota.

Petitioner in doing its required business under its license as customhouse broker, at the port of entry, gets, from the incoming carrier, the bills of lading which are its title papers to the goods in transit on board the incoming train, authorizing it to "clear" those goods. When invested with the title to the goods on board the train at the Port of Entry, and in the custody of the Collector of Customs, it presents a copy of the invoice to "Customs." Then an inspector is sent to make the inspection of the goods on board the train and shown on the invoice. When the "inspection" has been made by the Government's inspector, the shipment is released from the Collector's custody, and goes forward through the Port of Entry to the ultimate consignee.

The broker, if he have an immediate delivery bond has 48 hours in which to complete the "entry" for the records of the Collector of Customs. An "entry" must be made, by the broker.

The stopping of the imported goods is thus temporary and the broker's service and work on the shipment is done and completed before the goods become commingled with the property of the State. All of these its activities are prescribed by the Tariff Act as amended and by the Regulations made pursuant thereto (Exh. "DDD"; Ff. 1 and 2 and first 4 lines of f. 3, p. 170; f. 1, p. 258; f. 3, p. 272; f. 1, p. 273; f. 1, p. 278; last 2 lines p. 278, and first 2 lines on p. 279; beginning with "Q" at top, the balance of p. 281, p. 282; ff. 1 and 2, of p. 283; pp. 383, 384 and ff. 1 and 2, p. 284; last 2 lines of f. 1, f. 2 and 1st four lines of f. 3, p. 575, Record).

This stop, required by law, to permit this necessary service for the Government, for the shipper and for the importer or ultimate consignee, does not interrupt or end the journey of the goods in foreign commerce. The forward movement of the goods cleared from the "Port" remain foreign commerce until the goods become commingled with the property of the State after they have reached the ultimate consignee (*U. S.* v. *Sheffield Farms Co.*, 43 Fed. Supp. 1, 5).

The District Court held that the Petitioner was rightfully in court and ruled that the business was interstate commerce.

The Honorable Supreme Court of Minnesota reversed this ruling of the lower court by saying:

> "We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce."

It seems to us that this ruling of the Supreme Court of Minnesota invalidated the force, effect and scope of Petitioner's license as customhouse broker for that part of the district which lies within the boundaries of the State of Minnesota.

Such an effect, arising from the judicial application of the Minnesota Foreign Corporation Act clearly raises, as phases of the basic problem of this case, the first, third and fifth "questions presented." That is, which is the paramount authority—the authority of the Federal Government or the prohibition of the Minnesota Foreign Corporation Act?

The result of the Minnesota decision seems to invalidate the authority of Congress.

Question 2 is another phase of the basic or "ultimate" question in this case.

So are questions 4, 6 and 7.

II.

Respondent's "Additions and Corrections" Considered.

(a) Several of those pointed out by Respondent are, probably, of little consequence here. In any event we do not believe that many of them go to the heart of the issue. Some of the "additions and corrections" go beyond the Record, as will be presently pointed out.

It seems to us that it is immaterial that the Court found that Jensen kept for himself the customhouse brokerage business at Northgate, North Dakota. As Petitioner's president and manager his possession and control of Petitioner's business was fiduciary in character whether he kept or did not keep the Northgate business.

Backus v. *Finkelstein*, 23 F. (2d) 357, 364;
Guth v. *Loft, Inc.*, 5 Atl. (2d) 503 (Del.).

The Northgate business, if there was any, did not give him a license to betray his principal. While he was paid and accepted compensation for serving Petitioner as manager he followed, and took, at Noyes, Minnesota, the Petitioner's business for his own profit in defiance of the duties which his fiduciary relations imposed on him. His duty required him to conserve and develop—not to destroy—the business of the Petitioner.

(b) Next, Counsel impliedly criticizes the use of the phrase "95 per cent, or more of its freight shipments." The finding of the District Court is couched in conservative language. In the course of Respondent's testimony on this subject the Record shows the following:

> "Q. Now, Mr. Jensen, when this change occurred in routing of shipments of merchandise, the good will of the corporation customhouse broker became completely wiped out unless the corporation was able to follow the changed flow of commerce, isn't that right?"

"A. I presume you can put it that way." (Lines 13 to 19, F. 2, P. 150, R.)

And at lines 7 and 8, F. 1, p. 151, R., he testified the change "affected a large percentage—maybe 90 or 95 percent." He would not exaggerate. His testimony represents the minimum effect of the change.

At p. 153, ff. 2 and 3, this testimony is found:

"Q. We'll make it specific—*the 95 percent or more* (Italics supplied) of shipments that used to go through Portal, whether shipped by these people or other people, became, by reason of this change in routing, shipped into the United States through Noyes, isn't that right?"

"A. The great majority of them came through Noyes."

"Q. And so you agree that when this rerouting of shipments of merchandise or routing of shipments virtually ceased at Portal and was transferred to Noyes, Minnesota, that the corporation license permitted it to do business at Noyes or serve its clients there at Noyes the same as it had or could have been done at Portal, isn't that right?"

"A. The corporation license was valid in Noyes."

"Q. Then please answer my question?"

(Question, lines 5 to 10 above, read to witness.)

"A. That's right."

(c) Respondent's counsel has committed the unfortunate error of going beyond the record. His assertions beginning with the period "pursuant" at the end of the first line on page 4, to the end of the paragraph are not in the record agreed upon. (See paragraphs (b) and (c) of the stipulation of the parties, dated July 8, 1943.)

Similarly the two first paragraphs of p. 5 of Respondent's brief are not in the record. These are therefore unauthorized "additions", and Petitioner respectfully asks the Court to ignore them.

(d) Counsel for Respondent emphasizes Article 1410, Customs Regulations of 1937. For the moment we think it is enough to say that this regulation manifestly falls short of authorizing either a faithless agent to defraud his principal or of authorizing the imposition of regulations and restrictions which are a burden on, and an obstruction to, "commerce".

(e) Of course "Jensen did not issue any carrier's certificates." He procured their issuance to replace the bills of lading, detached from the waybills when they reached either the Port of Entry or the Port of Exit. Those detached bills of lading consigned the shipments of merchandise to Petitioner for "clearance." The following are pertinent excerpts of the testimony of Mr. Rime, who was Jensen's attorney in fact, showing what was done:

> "Q. And those shipments or the evidences of such brokers consignments were taken over to the C. P. R. by you or by Mr. Jensen isn't that right, through (to) the Canadian side?"
>
> "A. That's right."
>
> "Q. And there you prevailed or secured the—prevailed upon the officials of the C. P. R. or secured their consent to have the certificates changed on those Bills of Lading so that you could make entry?"
>
> "A. Not necessarily."
>
> "Q. What do you mean by 'not necessarily'; I would like to have positive answers; you did, didn't you?"
>
> "A. Oh yes, I did."
>
> "Q. Yes—and you understood all the time that without such change you couldn't under your power of attorney or Mr. Jensen couldn't use—couldn't under his license broker those shipments?"
>
> "A. That's right."
>
> (Fol. 3, p. 444 and Fol. 1, p. 445, R.)

He further testified:

"Q. Why did you resort to that practice?"

"A. Because they refused to allow me to make entry at the customhouse."

"Q. That is, the custom officials refused to let you act as broker on the shipments consigned to the Union Brokerage Company?"

"A. Yes."

"Q. And so, to avoid that regulation, you did, and Mr. Jensen did what you have just described?"

"A. Yes."

"Q. And the thing you did consisted of what we have talked about this afternoon, namely, that the stamp was left with the man in Emerson, isn't that right?"

"A. It was."

* * * * * * *

"Q. And who provided it (the stamp) for the office?"

"A. Jensen."

(Last 6 lines, p. 445, F. 1, p. 446, F. 2, p. 446, R.)

He further testified:

"Q. * * * is it not true that when shipments came consigned to the Union Brokerage Company, for example, or some other agent or some other broker whose business you or Jensen claimed, that in such cases these bills of lading were taken over and the stamp used to get the proper carrier's certificate so that clearances could be made?"

"A. That's true."

(Fol. 2, p. 449, R.)

And he also testified:

"Q. You never wired in a case of that kind the shipper named in such a bill of lading for authority to make the change, did you?"

"A. I never wired, no" (Last 4 lines, p. 466, R.).

"Q. Well then, I want to have you understand that my original question on that subject related to cases where you had brought the papers to Spear over at Emerson for changes—did you ever see anybody wire for instructions in regard to changes that you desired?"

"A. I never watch them do those things."

"Q. Well, did you see any?"

"A. No" (First 9 lines, p. 468, R.).

(f) We think, and respectfully submit, that the definition by the Minnesota Supreme Court of the duties of customhouse brokers is neither controlling nor important because its "definition" cannot change or modify, either the testimony in the case, or the express language of the Act of Congress or the Rules and Regulations adopted by the Treasury Department pursuant to the Act of Congress. These alone authoritatively define "the duties of customhouse brokers". The Courts interpret the effect of those statutes and regulations when they come in contact with concrete cases. Any other theory presupposes the existence of both the power and the inclination of the courts to legislate, and to thus usurp the powers and functions of the Congress, and the Agency designated by Congress, to administer the general revenue and Tariff systems of our country.

Therefore our duty to our client compels us to respectfully disagree with counsel for the Respondent as to what are duties of customhouse brokers. (See, sub-div. (d), Sec. 1; sub-div. (6), Sec. 8; Sec. 9, especially sub-divisions (i), (m), (g), (t), Exh. "A"; sub-div. (b), Sec 11, Exh. "A".)

(g) It is true that "an importer" may clear his own imports. But, to "protect the revenue of the United States" he must, like the broker, furnish a bond to insure

the payment of any additional duties which might thereafter be assessed against his importation.

It is also true, that the Government may retain possession of the imported merchandise until the duty thereon is paid.

No argument is required, we think, to demonstrate that such procedure, if practiced, hinders or impedes the free flow of foreign commerce, and leaves the revenue of the United States at least in a precarious condition.

Likewise no argument seems necessary to justify the conclusion that the licensed customhouse broker, who furnishes a bond, good for all his client importers, and who supplants uncertainty with certainty as to revenues, and who expedites the flow of foreign commerce, directly aids those engaged in the nation's foreign commerce by providing the means by which the United States is able to more expeditiously and economically secure the collection of its necessary revenues.

Performing that function and service the broker becomes an integral part of our foreign commerce, and an "instrumentality employed by the United States" to achieve that end or effect. He is at least employed by or serving those who actually engaged in foreign commerce, and his functions, business and duties are inseparably involved in the movement of goods, not before and not after, but while enroute in the movement in foreign commerce. Without the actual movement of goods in foreign commerce,—in foreign commerce enroute he has no purpose or function.

Mr. Phillips' Testimony.

(h) At p. 6 of Respondent's brief his counsel quotes a small part of Mr. Phillips' testimony and calls it his "pertinent testimony". That characterization is accurate only if considered in relation to other testimony on the subject. The pertinency appears when considered in connec-

tion with the admissions of Mr. Rime, reviewed under "e" of "Respondent's 'Additions and Corrections' Considered" of this reply brief, to Exhibits DDD and Q, and to Mr. Mackay's testimony. We refer to ff 2 and 3 except the last question, p. 390, f. 1, and 1st sentence of f. 2, p. 391, p. 393 ff 1 and 2, p. 394, last 3 lines of p. 395, p. 396, p. 404, ff 2 and 3, p. 408 and first line, p. 439; f. 2, p. 415, ff 2 and 3, p. 417, f. 1, p. 418, last two lines of f. 2 and f. 3, p. 570, f. 3, p. 571, ff 1 and 2, p. 572, ff 1 and 2, p. 574, ff 2 and 3, p. 575, ff 1 and 2, p. 580; f. 1 except first two lines and last 5 lines of f. 2, ff 1-3, except first 2 lines, p. 582, ff 1 and 2, p. 583, first par. of p. 584 (R. —). The bill of lading vests at least a qualified title in the broker. A stranger to that title cannot take it away.

Mr. Rime, as has been shown, admitted that he did not see anyone wiring to shippers for authority to change the designation of the consignee on the bills of lading. Without a change in the name of the consignee the shipments could not be cleared by him or Jensen through customs. Evidently to evade this rule, and to avoid detection in Noyes, the change was made in Emerson by detaching the Bills of lading and substituting carrier's certificates in their place and by stamping Jensen's name in place of that of the petitioner's. This done they were taken back to Noyes where these carrier's certificates were then used as credentials for clearing the shipments.

The quoted testimony of Mr. Phillips does not change these facts.

III.

Jurisdictional Statement Supplemented—Considered.

The additions to Petitioner's Jurisdictional Statement are harmless because they are immaterial to the issue presented by this petition for the writ of certiorari.

IV.

Reasons Assigned for Denial of Writ Considered.

(a) It is true that the loss suffered by Petitioner from the reversal of the lower court's decision is not in and of itself sufficient to warrant the granting of this petition. But we understand it is the rule that a Petitioner for "writ of certiorari" must show himself injured by the decision complained of. One who has suffered no damage from a decision deemed objectionable cannot be heard to complain.

Vollier v. *Neilston Warehouse Co.*, 311 U. S. 624, 85 L. Ed. 314.

That the Petitioner has sustained damage because of the decision of the Minnesota Court cannot well be disputed. The Respondent, while pretending to be faithfully and efficiently managing Petitioner's business for a paid salary of $250.00 a month, plus his expenses, deliberately violated the confidence reposed in him by his two widowed associate directors, deceived the Petitioner and transformed this prosperous corporate customhouse brokerage business into one conducted by him for his own use and profit, and then called it his own business. In executing this enterprise he used up all funds of his principal.

The District Court found him guilty of this deceit, and adjudged him, as constructive trustee, to pay over to Petitioner the net profits of 17 months of business, taken in and appropriated by him, in executing that deception. The Supreme Court of Minnesota annulled that judgment. That decision of the Supreme Court left the Petitioner empty-handed, and, on the other hand, left the Respondent in possession of the fruits of his faithless conduct.

This, we maintain, demonstrates that the Petitioner has suffered injury from the decision, which involves constitutional rights.

(b) Respondent repeatedly refers to Art. 1410, Customs Regulations of 1937, Sec. 6 of Exh. "A", as a sanctuary for avoiding the consequences of his conduct. We think this effort is vain, for here the issue concerns "commerce." The Minnesota Foreign Corporation Act, if it burdens or obstructs "commerce", is not any the less a burden because of that indefinite statement. Before the authority of Congress over "foreign commerce" may be impeached or challenged an "assent" to such state action must be expressly given by Congress.

Webber v. *State of Virginia*, 103 U. S. 344, 26 L. Ed. 565;
Brennan v. *City of Titusville*, 153 U. S. 289, 38 L. Ed. 719;
Welton v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347.

Syllabus 4 of this last case reads:

> "The inaction of Congress in prescribing rules to govern interstate commerce, is equivalent to its declaration that such commerce shall be free from any such restrictions" (p. 348).

Sec. 6 of Exh. "A" is no "assent" of Congress.

(c) Respondent seems to argue that under the Minnesota Foreign Corporation Act domestic and foreign corporations occupy positions of parity. Counsel says, p. 13:

> "* * * and, if so, if it is 'interfered with' or 'burdened' by such restrictive requirements as those imposed by the Minnesota Foreign Corporation Act, *requiring the petitioner, before it can have access to the courts of Minnesota, and before it can do business in the State of Minnesota, to qualify, pay the same franchise tax as a domestic corporation, and to appoint an agent upon whom service of process can be made.*" (Italics supplied.)

If counsel intended by this language to present such a claim he is grossly in error. There is a vast difference be-

tween the requirements on a domestic corporation and those on a foreign corporation. Under the Minnesota law the Petitioner is subjected to accumulating penalties, now aggregating, if computed, to at least $4000.00, just for failing to get a certificate of authority. (See 303.10, p. 15; 303.20, pp. 16, 17; 303.21, pp. 17, 18, Petition for Writ of Certiorari.)

(d) Respondent has challenged the fourth reason assigned by Petitioner for the granting of this petition and says:

> "This very question * * * has been decided by the Louisiana Supreme Court in the case of State vs. Oberle, Inc., 183 So. 347, supra."

This is, of course, a mistake.

A finding that a corporation is liable to the payment of taxes in a given state is not a finding that it is engaged in intrastate business. A corporation engaged in interstate or foreign commerce is not, by force of that fact, immune from local or state taxation. In this action the petitioner is not seeking immunity from the payment of proper taxes. Its claim here is that its activities and business affect, and are so much a part of, interstate (and foreign) commerce that the provisions of the Minnesota Foreign Corporation Act, when used to deny it access to the courts of Minnesota, "interefere with" and are a "burden" on "commerce."

The case of *State* v. *Oberle, Inc., supra*, does not decide "this very question". It concerns itself exclusively with the liability of Oberle, Inc., to pay the tax levied against it under the laws of Louisiana.

The case of *Duluth, S. S. & A. R. Co.* v. *Wilson*, 167 N. W. 55, is also not in point. The issue involved in the *Wilson* case is stated thus by that Court:

> "Action to recover the amount which defendant has retained of fees as customs broker while in plaintiff's

employment as chief clerk at Sault St. Marie." * * * (p. 53).

"It is the claim of the plaintiff that by reason of this arrangement it was entitled to retain and have the fees earned by the defendant. On the other hand, it is the claim of the defendant that, as he was the customs broker, he was entitled to the fees which he had earned * * *" (p. 56).

"It is manifest," the Court continued, "That the contract in question contained no engagement on the part of the plaintiff to do anything for which a license was required. * * * The contract was between the plaintiff and the defendant with reference to the disposition of the fees arising from such employment * * *."

The Court's discussion of the functions and duties of a customhouse broker is obiter.

The case of *Hopkins* v. *United States*, 171 U. S. 578, 43 L. Ed. 290, is also barren of any ruling which can be twisted into a decision of "this very question." The fact statement made by Justice Peckham takes that case out of the realm of the present controversy; and the Court, speaking through Justice Peckham, in deciding that case, only adds force to that claim. The Court, defining the issue of that case, said, p. 294, L. Ed.:

"The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, Chap. 647, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies', commonly spoken of as the anti-trust act."

Stray and detached phrases from that, or any other, decision, whether used to state or to reach it, cannot be used to state a rule of law, controlling the issue raised here.

But, above and beyond these considerations, this case of *Hopkins* v. *United States, supra*, is one of those cases in which the Commerce Clause was given a restricted inter-

pretation and which "allowed but little scope to the power of Congress." *Wickard* v. *Filburn*, 87 L. Ed. 57, 63. It was rendered at the beginning of the period which "ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder."

Wickard v. *Filburn, supra.*

The interpretation of the Commerce Clause made in the *Hopkins* case has been superseded by later decisions, so that it no longer represents the interpretation of the Commerce Clause.

This Court has returned "to the principles first enunciated by Chief Justice Marshall in Gibbons *vs.* Ogden, supra."

Wickard v. *Filburn*, 87 L. Ed. 57, 63.

Hence the decision in *Hopkins* v. *United States, supra*, is no authority here.

We believe that as used under authority of Congress, customhouse brokers are adjuncts of our foreign commerce, and as such "the means" necessarily employed therein. As such they are engaged in foreign commerce.

Chicago and NW Ry. Co. v. *Fuller*, 84 U. S. 560, 21 L. Ed. 710, 714, citing 2 Story, Const. paragraphs 1061, 1062.

(e) Respondent criticises the eighth reason urged by Petitioner for granting its petition, and in doing so he quotes a small part from p. 734, R.

But following that quoted language the Minnesota Court says:

> "*There has not always been uniformity in the federal decisions even with respect to the general principles to be followed.*" P. 734 R. (Italics Supplied.)

And at p. 735, R. the Minnesota Court says;

> "* * * Thus we observe the confusion that has resulted in an attempt to definte interstate commerce, but the greater difficulty has arisen in attempting to apply the general principles to the factual situation in each case."

If Congress has been silent in this exclusive field that silence is held to be an indication that the particular subject shall be left free from regulation.

Robbins v. *Taxing District of Shelby County*, 120 U. S. 489, 30 L. Ed. 694, 696.

At p. 736, the Court continues:

> "*The greatest difficulty* does not arise in these two classes of cases where it appears reasonably clear that the business is either strictly local and has no connection whatever with (Fol. 739) interstate commerce or where the business is of an interstate character and a matter of national concern. *The real problem* is presented in those situations where the business may to some extent affect interstate commerce, where congress has not seen fit to regulate, and where no question of national public policy is involved. In that group of cases the line of demarcation cannot always be clearly drawn." (Italics supplied).

At p. 737, R., the Minnesota Court speaks of "this vexatious and difficult problem."

At p. 740, R., the Minnesota Court states that "*the United States Supreme Court has not passed directly on the precise question here presented* * * *" (Italics supplied).

This, we submit, fully justifies our original statement that the "Supreme Court of Minnesota recognizes that there is involved in this case an important question of Federal law not heretofore ruled on by this Court * * *" Reason 8, p. 32, Petition.

(f) We have covered Respondent's criticism of reason 9.

(g) Respondent's criticism of reason 10 has no merit. The claim that the Minnesota Foreign Corporation Act imposes "the same *franchise tax* (Italics supplied) as it imposes upon its own domestic corporations," is an incorrect statement unless the words "franchise tax" implies some hidden and unappreciated meaning. Minnesota does not, and other states do not, conceal the fact that discriminations are practiced against foreign corporations seeking admission to the State. If it were not so, the Supreme Court of Minnesota would have no justification for saying:

> "It is well settled that a state may impose such restrictions as it sees fit as a prerequisite to a foreign corporation coming into the state to do business." P. 733, R. * * * "Statutes similar to the one here invoked by defendants have usually been held to place an undue burden on interstate commerce and hence to be unconstitutional as to foreign corporations engaged in interstate business." P. 734, R.

The effect of the Minnesota decision, if it becomes a precedent, is undeniably that corporations licensed as customhouse brokers, must qualify, and keep qualified, in every state of the Union where similar Foreign Corporation acts exist.

(h) Petitioner respectfully adheres to reason 11.

The question before the District Court and the Supreme Court of Minnesota was not whether Petitioner's Customhouse brokerage business obstructed or interfered with the power of Congress to regulate interstate commerce. The Respondent contended in the District and Supreme Courts that petitioner's customhouse brokerage business was not interstate commerce, and that therefore petitioner was subject to the Minnesota Foreign Corporation Act.

The Petitioner on the other hand contended in the same Courts that its business has such "a substantial relation to interstate (or foreign) commerce" that it was protected by the constitutional commerce clause and that to require it to comply with the Minnesota Foreign Corporation Act was to place an undue burden on interstate commerce, because the Minnesota Foreign Corporation Act, if enforced against, it, interfered with or obstructed "the exercise of the granted power of Congress to regulate interstate commerce." P. 737 R.

Beginning with the new sentence of the 5th line from the end of p. 742, continuing on p. 743, R. — the Court explains that the requirements of the Minnesota Foreign Corporation Act are "reasonable", "and not a hardship upon the business. Nor do we think", the Court continues, "that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case".

These two lines of thought of the Supreme Court of Minnesota appear inconsistent because it was never claimed by either party to this case that the business of Petitioner as a customhouse broker interfered with or obstructed interstate commerce.

Respondent's "Further Arguments" and Cases Studied.

"The judicial task" in this case is not to mark "out the extent to which Congress has exercised (or may exercise) its constitutional power over commerce." As we view the problem, it is only necessary to recognize and apply to this case ancient principles of interstate "commerce".

Wickard v. *Filburn*, 87 L. Ed. 57; *United States* v. *Darby*, 312, U. S. 100, 85 L. Ed. 609; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638, 1644 to 1649,—and *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, are cases which

construe congressional extensions of its exclusive authority in the field of "commerce", granted to Congress by the Constitution. But that is not true in the instant case. On the contrary, it seems to us that the relationship between the functions of a customhouse broker and the functions of the agency to which is assigned the task of safeguarding the revenues of the United States is so intimate that never before has the claim been made that the broker's services have no connection with interstate or foreign commerce.

Is it not clear that the customhouse broker is an implement used by the Government for regulating commerce and for safeguarding the revenues of the United States which accrue to the United States under the Tariff Act? The effects of the activities of the customhouse broker are clearly beneficial to the Government and to Foreign commerce. His services are inseparable from the foreign commerce out of which he receives his compensation and the Government its revenue. If these his activities are hindered, obstructed, or burdened, definite and self-evident repercussions will be felt to exert a positive influence on the nation's business, and the Treasury of the United States because his services are attached to, and exert a substantial economic effect on, "foreign commerce." Without his services, the entire Tariff revenue system would deteriorate into disorder and the machinery used for the collection of the public revenue would have to be revamped or enlarged beyond present-day conceptions.

> "'Commerce' in its broadest acceptation embraces not merely traffic, but the *means* and vehicles by which it is prosecuted."
>
> *Chicago, N. W. Ry. Co.* v. *Fuller*, 84 U. S. 560, 21 L. Ed. 710.

Since the Constitution is the supreme law of the land a State is without power to determine whether action of the

state will obstruct or interfere with or burden commerce. This power inheres exclusively in the United States.

Alabama & V. Ry. Co. v. *Jackson*, 271 U. S. 244, 70 L. Ed. 928, 931;

Louisiana, etc. v. *Texas, etc.*, 284 U. S. 125, 76 L. Ed. 201.

A state may possibly impose regulations under its police power, although such regulations may affect interstate commerce, until such time as Congress takes possession of the field under its superior authority; but that power "does not apply where the state undertakes to regulate interstate commerce by imposing burdens upon it."

Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458.

"* * * It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it * * *."

Baltimore & Ohio Southwestern Railroad Co. v. *Lula Burtch*, 68 L. Ed. 433, 436.

On these principles, and on the fact that a customhouse broker is not the ultimate consignee, but a sort of station or agent used in the flow of foreign commerce by the originating shipper in Canada, by the ultimate consignee in the United States, and by the Government to facilitate the free flow of commerce and to collect the duty assessed under the Tariff Act before the goods reach the ultimate consumer, there to become commingled with the property of the state, the Petitioner claims its business is interstate or foreign commerce, and that it is relieved of the onerous burdens imposed by the Minnesota Foreign Corporation Act.

McNeill v. *Southern*, 202 U. S. 543, 561, 562, 50 L. Ed. 1142, 1148.

Even if petitioner's business and activities are "local and though it may not be regarded as commerce", it is still protected by the Commerce Clause because its business "exerts a substantial economic effect on (foreign) commerce."

Words in quotation from *Wickard* v. *Filburn, supra.*

Summary.

In the enactment of our Tariff system, Congress has authorized the Secretary of the Treasury to license persons, corporations and partnerships to engage in the business of customhouse brokers within geographically defined areas, called U. S. customs collection districts. The duties prescribed by Congress and the Treasury for, and the business done by, these customhouse brokers are identical in each district. They and their business are means or implements employed by the Government in the regulation of the nation's foreign commerce and for the protection and collection of the public revenue derived from duties imposed on importations into the United States from a foreign country under the Tariff Act.

So, reducing the case to its narrowest compass the problem may be stated thus:

The petitioner, who is a North Dakota corporation and a licensed customhouse broker, brought suit in the proper district court of Minnesota, namely, in the county included in the district for which it was licensed to transact its customhouse brokerage business, to secure a judgment that Respondent be ordered to account to it as a constructive trustee for a large sum of money for which he had wrongfully refused to account, derived from customhouse brokerage business conducted at Noyes, within the district.

Among other defenses the Respondent pleaded that since the Petitioner is a North Dakota corporation, and had not qualified under the Minnesota Foreign Corporation Act,

the District Court was without jurisdiction to hear and determine the cause.

The Petitioner answered this defense by saying that it had not obtained a certificate of authority to do business in Minnesota pursuant to the Minnesota Foreign Corporation Act, but that nevertheless the Court had jurisdiction because Petitioner was engaged in foreign and interstate commerce, and that therefore the Minnesota Foreign Corporation Act, imposing burdens and restrictions on foreign and interstate commerce, did not apply and could not be used to prevent it from the use of the Minnesota courts without violating its constitutional rights.

The District Court of Minnesota overruled the objections of the Respondent, assumed jurisdiction of the cause and held "that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada" (P. 699, R.).

Thereupon the Respondent appealed to the Supreme Court of Minnesota. There again the Respondent contended that the District Court of Minnesota had rendered a void judgment because it had no jurisdiction for the reasons assigned in the lower court.

The Petitioner replied in the Supreme Court, as it had done in the district court, that its business was so closely related to foreign commerce that to enforce the provisions of the Minnesota Foreign Corporation Act against it was to burden and obstruct "commerce" within the purview of Art. I, Sec. 8, cl. 3 of the Constitution of the United States.

The Supreme Court of Minnesota reversed the District Court and held:

> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any

way insofar as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such a broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce." (The last par., on p. 738, ending on p. 739, R.)

Thereupon the Petitioner brought this petition for a Writ of Certiorari to obtain a review of the decision rendered by the highest court of the State of Minnesota.

Thus, in the final analysis, the issue is:

Did the Supreme Court of Minnesota err in reversing the holding of the District Court, and in holding that the customhouse broker "remotely, if at all, affects" foreign and interstate commerce, and that the provisions of the Minnesota Foreign Corporation Act are "not an obstruction or interference with interstate commerce."

On the facts herein, and for reasons set forth in the petition, in our original supporting brief and in this reply brief, and on the authorities cited, Petitioner respectfully prays this Honorable Court that its petition for this Writ be granted.

Respectfully submitted,

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Dated: September —, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, A CORPORATION,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR PETITIONER

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NORMAN G. JENSEN AND CURTIS M. RIME,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR PETITIONER

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Order for Judgment of the District Court of Minnesota are found at pages 123-138 of Record. The "memorandum" of the District Court appears at page 138, Record. The opinion of the Supreme Court of Minnesota is reported in 9 N. W. R. (2nd), beginning at page 721 and appears at pages 142-158, Record.

JURISDICTION

The decision of the Supreme Court of Minnesota, which Petitioner seeks to have reviewed, was filed May 14, 1943, and the judgment entered thereon was entered on May 25, 1943.

The Petition for a Writ of Certiorari was filed on August 25, 1943, and was granted October 11, 1943.

The jurisdiction of this Court is invoked under Sec. 237 (b), The United States Judicial Code, 28 U. S. C. A., Sec. 344 (b), as amended.

The jurisdictional grounds are stated at length at pages 13 to 28 in the Petition for Writ of Certiorari under the heading "Jurisdictional Statement."

QUESTIONS PRESENTED

Conceding that the State of Minnesota may impose such restrictions as she may see fit as prerequisite conditions for allowing a foreign corporation to come into the State to do business therein where the business of such corporation has no substantial relation to interstate or foreign commerce, the following questions are presented:

1. Where, as here, a corporation, organized under the laws of North Dakota, is engaged in the business of a customhouse broker under license granted by the United States Treasury Department, pursuant to an Act of Congress, for a United States customs collection district embracing the States of North Dakota, South Dakota, and the County of Kittson, in Minnesota, may the State of Minnesota deny such a customhouse broker the right to sue in her courts for the protection of its property because of its failure to comply with the statute which provides that a foreign corporation cannot bring an action in the courts of Minne-

sota without a Certificate of Authority to do business therein?

2. Do the requirements of the Minnesota Foreign Corporation Act burden or obstruct "commerce," within the purview of clause 3, Sec. 8, Art. I of the Constitution of the United States, when applied so as to forbid corporation customhouse brokers from the use of her courts without complying with the provisions of the Minnesota Foreign Corporation Act? (Appendix I, *infra.*)

3. May the State of Minnesota impair or limit the right of the Petitioner, which is a North Dakota corporation duly licensed by the United States Treasury Department to engage in the business of a customhouse broker, to exercise freely the privileges arising from its Federal license as a customhouse broker, in that part of the district which lies within the borders of Minnesota?

4. Is the ruling of the Supreme Court of Minnesota an interference with, and an attempt to nullify, an Act of Congress enacted to protect the revenue of the United States and her commerce with a foreign country?

5. Is a Federally licensed customhouse broker an instrumentality employed by the Government of the United States to facilitate the free flow of commerce between foreign countries and the United States, and to protect the revenue of the Federal Government?

6. By deciding that Petitioner must comply with the provisions imposed by the Minnesota Foreign Corporation Act (Ch. 200, Laws of Minnesota, 1935, Appendix I, *infra*) before it may appeal to her courts for judicial relief, has the Petitioner been denied the privileges and immunities guaranteed by the Constitution of the United States?

STATUTES INVOLVED

The statutes involved are the Minnesota Foreign Corporation Act, Ch. 200, Laws of Minnesota, 1935; the Tariff Act of 1930, as amended, and the "Rules and Regulations Relating to Customhouse Brokers," issued by the United States Treasury Department, Office of the Secretary, Washington, April 16, 1936, Department Circular No. 559, (filed with the Division of the Federal Register, April 20, 1936, 9:48 a. m.), as amended.

The relevant and material parts of these laws, Rules and Regulations, are printed in the Appendix, *infra*.

STATEMENT OF THE CASE

This action had its origin in a suit brought in 1941 by Petitioner, a North Dakota corporation, against the Respondents. That suit was brought in the District Court of Kittson County, 14th Judicial District, Minnesota (R. 1-18).

Ever since March, 1928, and before, Petitioner has been doing business continuously as a corporation customhouse broker, licensed by the United States Treasury Department (R. 1). Its principal place of business has been Portal, Burke County, North Dakota (R. 124). Its license was granted for United States Customs Collection District 34, also known as the Dakota District (R. 1).

The suit was brought to secure a decree adjudging that the Respondents (defendants) account to Petitioner for the profits realized from July 1, 1940, on the theory that Respondent Jensen, having done business at Noyes, Minnesota, with Petitioner's clients, in breach of his fiduciary duties owing to Petitioner, held the profits from that brokerage business as a constructive trustee of the Petitioner (R. 15, 16).

Under the charge of conspiracy, Curtis M. Rime, attorney in fact of Mr. Jensen, was joined as defendant (R. 6-12).

The essential and controlling facts material to the consideration of the questions here presented are:

On September 6, 1938, Norman G. Jensen and Petitioner were each a customhouse broker at Portal, North Dakota. Mr. Jensen had operated for about a year as an individually licensed customhouse broker, while Petitioner had been doing business as a corporation, duly licensed (R. 126, 127, 3, 31).

On September 6, 1938, Petitioner bought out Mr. Jensen's business (R. 17, 18, 127, Exhs. B, B-1, B-2 and C).

On concluding this purchase of Mr. Jensen's business, and as a part of the bargain, Norman G. Jensen was, on the same date, elected director, president and treasurer of Petitioner, and designated as the manager of its customhouse brokerage business. He immediately accepted those offices and positions of trust, and as such took possession and charge of Petitioner's books, property, correspondence and records. He continued to hold, and he continuously professed and represented that he was discharging the duties of, those offices of trust until November 5, 1940, when he resigned at the request of Petitioner's Board of Directors (R. 4, 5, 130).

On July 1, 1940, in accordance with plans it had perfected during previous weeks or months, the Canadian Pacific Railway Company, which was the only railroad entering Portal, North Dakota (the home office of Petitioner), changed the routing of its freight shipments from Canada into the United States. This change took about 95 per cent of the freight shipments away from the Port of Portal, North Dakota, and routed them through Winnipeg and Emerson into the United States through the Port of Noyes, in Kittson County, Minnesota. Noyes is located in United States Customs Collection District 34. This change transferred

at least 95 per cent of Petitioner's business from Portal, North Dakota, in District 34 to Noyes, Minnesota, in the same district (R. 6, Sec. IX (a), 46, 47, 48, 131).

Taking advantage of his advance and inside information about this change in the routing of freight shipments by the Canadian Pacific Railway Company, effective July 1, 1940, Respondent Jensen, while yet president, director and treasurer of the Petitioner and the manager of its business, conceived the scheme of capturing his principal's business for himself by "following" Petitioner's business to the Port of Noyes, there to carry on the business of Petitioner in his own name, for his own use and for his own profit. His associate and controlling directors of the Petitioner were two widows, Mrs. Annie Kramer of Portal, North Dakota, and Mrs. Nan W. Anderson of St. Paul. By various means he successfully concealed for some time his execution of this scheme. By November 5, 1940, his fraudulent breach of duty had been discovered. He was asked to, and did, resign on November 5, 1940; but he continued thereafter to claim and operate Petitioner's business as his own at Noyes, Minnesota (R. 46, 47, 49, 50, 51, 52, 56, 58, 59, 65, 68, 116, 117, 131-134, Exh. N).

Petitioner thereupon in 1941 brought this suit in the District Court for Kittson County, Minnesota (R. 1-18).

By their answer to the complaint, and by timely objections at the commencement of, and during, the trial, the Respondents, among other defenses, pleaded and urged that since the Petitioner is a North Dakota corporation, and had not qualified as a foreign corporation under the Minnesota Foreign Corporation Act (Appendix I, *infra*), the District Court of Minnesota was without jurisdiction to hear and determine the cause (R. 18, 29, 30, 118, 168).

Petitioner answered this defense by saying that while it had not obtained a Certificate of Authority to do business in

Minnesota pursuant to the Minnesota Foreign Corporation Act, the Court nevertheless had jurisdiction over the parties and the subject of the action because Petitioner was engaged in foreign commerce, and that therefore the Minnesota Foreign Corporation Act, imposing burdens and restrictions on foreign and interstate commerce, did not apply and could not be used to prevent it from access to the Minnesota courts (R. 30).

The District Court of Minnesota overruled that defense of the Respondents, and held "that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada" (R. 122, 125).

Judgment was entered against the Respondents in the District Court of Minnesota, Kittson County, in favor of the Petitioner, on August 20, 1942, for $10,324.80, in harmony with that ruling of the District Court (R. 139, 140).

Thereupon Respondents appealed to the Supreme Court of Minnesota where they again contended that the District Court had erroneously assumed jurisdiction of this cause and had therefore rendered a void judgment because Petitioner had not obtained a Certificate of Authority pursuant to the Minnesota Foreign Corporation Act (R. 141, 147, 168).

Petitioner answered in the Supreme Court of Minnesota, as it had done in the District Court, that its business was so closely related to foreign commerce that to enforce the provisions of the Minnesota Foreign Corporation Act against it was to burden and obstruct "commerce" within the purview of Art. I, Sec. 8, clause 3 of the Constitution of the United States.

The Supreme Court of Minnesota reversed the District Court, ordered a dismissal of the case as prayed for by the

Respondents in the lower court, and held:

> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such a broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement (of the Minnesota Foreign Corporation Act) is not an obstruction or interference with interstate commerce" (R. 153, 154).

Petitioner thereupon applied for and obtained this Writ of Certiorari to review the decision of the highest court of the State of Minnesota.

The issues, reduced to their narrowest compass, may therefore be stated in the form of the following questions:

Is the business of Petitioner as a customhouse broker so closely related to foreign or interstate commerce that, within the purview of Art. 1, Sec. 8, clause 3 of the Constitution of the United States, it is engaged in "commerce"? Are the provisions of the Minnesota Foreign Corporation Act a "burden" and an "obstruction" to "commerce" and therefore void or inapplicable when used to deny to Petitioner the right to sue in the courts of Minnesota for the protection of its property? May the State of Minnesota reduce the area within which Petitioner is empowered to do business as a customhouse broker by denying it the right to "do business" or to sue in that part of the district which lies in Minnesota, and which is included in the United States Customs Collection District as defined by the President of the United States, pursuant to authority of Congress? Did the Supreme Court of Minnesota err in reversing the holding of the District Court by ruling that a customhouse broker "does not come into contact with the commerce itself in

any way in so far as its actual movement is concerned" and in further holding that the provisions of the Minnesota Foreign Corporation Act are not "an obstruction upon the commerce itself nor an interference therewith"? (R. 153, 158.)

The character of this problem, as well as the basic claims of the respective parties to this cause will be made plain by a brief recital of the indisputable and essential facts established by the evidence in this case.

The "Rules and Regulations Relating to Customhouse Brokers" is Exhibit A in this case (Appendix II, *infra*). These "Rules" have been "promulgated" by the Secretary of the Treasury "by virtue of, and pursuant to, the authority vested in me, including the authority conferred by Sec. 641 of the Tariff Act of 1930, as amended" (Appendix II, *infra*).

These Rules and Regulations define the word "customhouse broker" to include "any person who, acting on behalf of others, transacts customs business not limited to a kind described in Sec. 7 of these regulations" (Sec. 2, Appendix II, *infra*).

Sec. 7 of Rules and Regulations relating to Customhouse Brokers, provides that persons may clear their "own importations" (Secs. 1483, 1484, 1641 (e), Title 19, U. S. C. A.).

No one is authorized to transact business "as a customhouse broker without a license granted" by the Treasury Department, and "no representatives of the Treasury Department shall recognize or deal with any person transacting the business of a customhouse broker . . . unless such person is licensed as a customhouse broker. . . ." (Sec. 1 (a) and (b), Appendix II, *infra*, and Sec. 1641, Title 19, U. S. C. A., Appendix III, *infra*.

"Person" includes "corporations, associations and partnerships" (Sec. 2 (d), Appendix II, *infra*).

"To protect importers and the revenue of the United States," the business of customhouse broker is closely and

minutely regulated, supervised and controlled by the Treasury Department. This regulation, control and supervision is exercised and enforced, as will be seen later, to "protect importers and the revenue of the United States," and to foster trade with foreign nations by providing, so far as human ingenuity may do so, prompt and effective control over the money involved in those transactions (*In re Landeck & Merrill*, 20 Fed. (2nd) 249, and Sec. 1 (b), (d), Sec. 2 (b), Sec. 3 (d), Sec. 8 (a), (b) and (g), Sec. 9, Appendix II, *infra*).

The books and records of a customhouse broker are subject to inspection by the Treasury Department. Indeed it is the mandatory duty of the customhouse broker to keep his records, books and correspondence "on file for at least five years" and to maintain them "in such manner that they may readily be examined" by any "duly accredited agents of the United States on demand therefor" during five years "or within such longer period of time during which they remain in the possession of the broker"; and the broker must also be prepared to furnish "such additional information regarding his activities *as a licensed customhouse broker*, as such agents may require" (Italics supplied) (Sec. 8 (a), (b) and (g), Appendix II, *infra*).

The broker must pay over to the Government "when due" all money payable as duty or tax on merchandise cleared, and account for all moneys received for or from his shipper clients under penalty of losing his license (Sec. 9, (m), Appendix II, *infra*).

The law and regulations require, in the case of a corporation licensed as customhouse broker, that at least two of its officers be individually licensed (Sec. 1 (c), Appendix II, *infra*, and R. 33).

The broker's duties and obligations are found stated in Exhibit A, and in Title 19, U. S. C. A., Appendices II and

III, *infra*. Additional duties and regulations of the customhouse broker and his business may be promulgated by the Secretary of the Treasury (Sec. 9 (a), Appendix II, *infra*).

When Petitioner bought out Mr. Jensen's business, or when Mr. Jensen sold his business to Petitioner on September 6, 1938, the two officers individually licensed were Mrs. Kramer's son, Harry, and Minton V. Carlson.

To make room for Mr. Jensen in the corporate structure of Petitioner, and to comply with this requirement on a corporation customhouse broker, Petitioner bought up the shares of stock standing in the name of Minton V. Carlson, procured his resignation, issued the 25 shares of stock to Mr. Jensen and elected him to the offices mentioned. In this manner Mr. Jensen became, on the conclusion of the transaction of September 6, 1938, one of the two officers individually licensed, and his license became committed to the use of the Petitioner in its business (R. 126 (11), 127 (14), 129 (15)).

Respondent testified:

> "I don't know whether I have your question right or not; I will try to answer it by making this statement; the majority of a broker's business is clearing shipments from Canada or some other foreign country shipped through a port at which a broker is working, into the United States" (R. 35).
>
> — — —
>
> "Q. And so to make this attempted investigation clear and simple, a customhouse broker is rendering services to both the Government of the United States and the importer, isn't that right?
>
> A. That's right.
>
> Q. And that is all his business?
>
> A. No, he renders services to exporters.
>
> Q. All right, we'll add that to it—is that all of his services?
>
> A. It is all I can think of right now" (R. 36).

He further testified:

"Q. And as a matter of fact you did set up an office at Noyes?

A. I did set up an office in Noyes.

Q. And at the time you set it up you were the manager, the actual manager and the president and treasurer and director of the plaintiff corporation, isn't that right?

A. I was.

Q. And in setting up that office at Noyes, you used the same license which as an officer and manager you used to fill the requirements of the plaintiff by the laws governing licensed customhouse brokers?

A. Yes, I used my individual license.

Q. And that individual license had been committed to the business of the plaintiff by reason of the arrangement and bargain made on September 6, 1938?

A. That license was to be used as one of the two licenses to enable the Union Brokerage Company to maintain its license to Portal.

Q. Or anywhere else in the district—in District No. 34 of which Noyes is a part?

A. Yes" (R. 49, 50).

As indicating the nature and characteristics of this business, and how Respondent had secretly prepared to follow the Petitioner's business to Noyes, there to capture it for himself, Mr. Jensen admitted that before June 29, 1940, he trained Mr. Rime for about five days in clearing shipments (R. 131 (22), 132, 133, 51, 58, 60, 61, 62, 64, 65, 67), and that before July 1, 1940, he executed and filed with the Deputy Collector of Customs at Noyes the power of attorney which he granted to Mr. Rime to enable him to clear shipments at the Port of Noyes in Mr. Jensen's name (R. 58, 59, 64, 68, 92-94, 96-103, 104).

On June 29, 1940, Mr. Jensen, known as the president of Petitioner, instructed the chief clerk of the railways at Noyes, Minnesota, as follows:

"Kindly deliver to Mr. Curtis Rime all bills of lading and invoices for *shipments to be cleared through customs* by Norman G. Jensen or Union Brokerage Company" (Italics supplied) (Exh. Q, R. 132, 107).

On July 3, 1940, Mr. Jensen confirms the fact that a customhouse broker must have the title papers to merchandise moving in foreign commerce in order to carry on the business, for he wrote to H. E. Clark, one of the officers of the Soo Railway, in part, as follows:

"I talked to Mr. Plow this afternoon (Assistant Freight Traffic Manager of the C. P. R. with offices in Winnipeg) and his assistant informs me that *they will see that the C. P. R. agent at Emerson will detach the bills of lading and invoices from the waybills on the merchandise sent to me to be cleared.* I will appreciate anything that you can do to assist in this matter" (Italics supplied) (Exh. N, R. 50).

Later he explained this statement found in Exhibit N by testifying that his meaning was:

"Just that the agent of the C. P. R. will give to me or to Mr. Rime *the bills of lading and the invoices on merchandise consigned to us to be cleared*, so that we could make the entry; in other words, we would get the bill of lading and the invoice from the Canadian Railroad Company . . . at Emerson" (Italics supplied) (R. 50).

He also admitted that "the bill of lading consigns the shipment to the customs broker at the Port of Entry" (R. 50).

The customhouse broker does not load nor produce the goods moving in interstate or foreign commerce. But, the customhouse broker, designated as such in the bill of lading and waybill, is a party to the importation handled by him from the point the shipment originates in Canada, or in any other foreign country, until he has released it from cus-

toms for delivery to the ultimate consignee or importer. The merchandise loaded on cars, say, at Vancouver, B. C., for shipment to a wholesale house in Chicago, for example, cannot proceed beyond the Port of Entry until it is "cleared of customs" (R. 70, 111, 112). The shipper and the importer working together, or the shipper on his own, usually at the point of origin, designate a broker working at the Port to "clear" the shipment, or get it out of the control and custody of the Collector of Customs that it may be delivered to the buyer. The name of the "broker" designated is shown on the bill of lading and waybill. This bill of lading invests the broker with the title to the shipment for clearance purposes. The bill of lading, invoice and some other required papers are attached to the waybill. The waybill stays with the car until the goods have been delivered to the importer at the point of ultimate destination. But regardless of the final destination, and regardless of whether the goods shipped prove to be dutiable, the merchandise coming from Canada cannot leave the Port of Entry and the carrier cannot proceed with the goods covered by the bill of lading to the ultimate consignee, until the Collector of Customs has been satisfied and authorizes the further movement of that merchandise. The title of the broker dates from the time the bill of lading is executed and delivered to the carrier by the shipper at the point of origin and continues until the merchandise has been released from "customs." Thus the importers and the revenue of the United States are "protected" (Exhs. DDD and EEE, R. 74, 81 (ff. 2, p. 599 of Original Record), 60, 62, 63, 64, 67, 69, 70-77, 83-86, 90, 91, 109).

The merchandise covered by the bill of lading when it enters a Port is subject to the payment of duty unless it comes within some exception in the Tariff Act. The broker estimates the duty called for by the Tariff schedule, applied to

the particular kind of merchandise shown on the invoice (R. 112, 115, 116, Secs. 1481-1483, 1485, 1505, Appendix III, *infra*).

The duty so computed and estimated is paid by the broker as a condition for the "entry" of the goods. His estimate of the amount of money due to the United States is not conclusive on the United States, nor on the Collector, to whom it is paid as a rule. The correction, if any be needed, falls back on the broker who is the "owner" of the goods so far as the Government is concerned. He or his surety must make good any additional duty which may later be required. Likewise, he must refund to the shipper or importer any money on account of an excessive charge (R. 115, 116).

When the inspection has been made and the goods in the custody of customs has been "entered" the Collector releases the shipment, and the railroad may then proceed on its journey to deliver it to the ultimate consignee (R. 111, 112). Only then does the broker's business and contact with foreign commerce end. The broker's liability for the payment of the duty, if erroneously computed, continues indefinitely.

The broker may elect to bill his fees and the amount of the estimated duty against the carrier and receive from the railroad an advancement of both. If he does not elect to do this he must either draw on his client's money to pay the amount due to the United States, or advance his own money and bill his client later. The Government does not extend credit.

Mr. Phillips, cashier of the Soo and Great Northern Railways, of Noyes, testified:

> "Q. When goods come from across the border, subject to entry here in the United States, what is done by the railway or by you?
>
> A. The papers are stripped . . . that accompany the shipment to be delivered to the customs broker

Usually a bill of lading and stock contract, invoices and veterinarian certificates—various papers of that kind. . . . The waybill stays in the railway office. – – – The waybill is the instructions to the railroad for the conductor handling the car. . . . They (the bill of lading and invoice) are delivered to the customs broker to whom they are consigned. . . . The conductor brings them into the depot. . . . They usually sort the bills in piles for the various brokers and remove the papers. . . . (If a bill of lading fails to show a broker consignee) the car is refused; that is refused—that is from the connecting line and we notify them of the fact. (The invoice alone is insufficient authority) the bill of lading has to be consigned to the broker" (R. 69, 70, 72).

"Q. And what does the waybill show?

A. Shows the car number, the date, waybill numbers, destination, originating station, the shipper, the route, the consignee, and hold-over for icing or other care, then the commodity would be stated, the weight, freight weight or rate, I mean amount to be collected, and there usually is, in fact almost always, a list of all papers that *accompany the shipment crossing the boundary* (Italics supplied).

Q. And does that paper you call the waybill indicate the name of the broker or does it not?

A. It usually does" (R. 73).

On his cross examination, Mr. Phillips testified:

"Q. In general, what is this instrument or thing which you call a bill of lading?

A. That's the order specified by the Interstate Commerce Commission or the Canadian Commission which has to be filled out to move a shipment.

Q. Well, isn't it in the nature of a request or demand on the part of a shipper to the railroad to ship certain things to a certain place?

A. Yes. . . .

Q. And now when the railroad receives bills of lading are there more than one copy of that bill of lading at the time?

A. The shipper receives two of them back after being receipted for by the railroad company. . . .

Q. How many are there all together as a rule?

A. Speaking of a Canadian railroad and the shipment crossing the boundary line there are usually four.

. . .

Q. Now, accompanying that bill of lading the railroad company gets, which I understand is in the nature of a request or a demand by the shipper, they, themselves make out an instrument called a waybill?

A. Y , sir.

Q. And that goes into the details as to the shipper and consignee and number of the car and type of merchandise and the tariff and all the rest of it?

A. Yes, that's the instrument which moves the car.

. . .

Q. Now, those two papers are put together, I suppose, the bill of lading and the waybill?

A. As far as to the bill of lading for customs purposes—yes, that's usual.

Q. Well, the conductor is the man who is in charge of those instruments on the freight train?

A. Yes.

Q. Now, there was another instrument which you referred to as the invoices, what are they?

A. The invoice is made out by the shipper or the owner of the goods showing the value, the amount and— . . .

Q. That's the invoice and it also accompanies the bill of lading and the waybill?

A. Usually although it can be mailed by the shipper to the customs broker.

Q. Now, you say there was a custom, general custom, of shippers when they wished to designate a particular broker, to make some form of designation on one of these instruments; which one would that generally appear upon?

A. It would be made by the shipper on the bill of lading but the railroad would have to show it on the waybill also.

Q. Now, then, if a shipper wishes to consign a shipment to a certain broker, we'll say, at Noyes, they should designate in some manner upon the bill of lading the name of the broker?

A. Yes.

Q. And the railroad company would also write the name of that broker upon the waybill?

A. That's correct.

Q. And then when that shipment arrives at the port of entry how would the broker come into possession of the bill of lading; from whom would he receive it?

A. From the railroad agent.

Q. The conductor, when he arrives, turns these bills of lading and waybills all over to the agent, does he?

A. Yes. - - -

Q. The agent then turns the bills of lading over to the broker, those on which his name is indicated?

A. Yes. - - -

Q. And what does the broker do with it then?

A. He would fill out—depending on the time of day—he would fill out certain forms for the customs so that inspection of the car could be made.

Q. And file that with the customs officials along with the bill of lading?

A. No, the bill of lading would not be filed until later; it can be filed as much as 48 hours later. . . .

Q. You had some way of determining when the inspection is completed?

A. We send men right with them. . . . -

Q. All right—then what does the broker do in order to obtain these advancements of fees and duties from the railroad company; what evidence does he present to the railroad company to get a draft for his brokerage and for the duty?

A. He presents a list, as they were called awhile ago, a clearance sheet. . . .

Q. He merely brings in a so-called clearance sheet in which he shows that he is entitled to brokerage on certain cars?

A. Yes. . . .

Q. —is it the practice and custom of the railroad company, the receiving railroad company in the United States to advance, in certain cases, the brokerage due to the customs broker?

A. Whenever it is asked for the law provides for that.

Q. That the railroad company pay it?

A. Yes.

Q. And also the duty upon the goods going to the government?

A. Yes.

Q. And the railroad company reimburses itself later, I suppose, from the consignee?

A. It is collected at the time the freight is collected. . . . The Interstate Commerce law reads that custom fees and brokerage fees will be advanced for collection from the consignee. . . .

Q. The Great Northern Railway Company during that period of time, advanced brokerage to Norman G. Jensen of $1,169.25?

A. Yes. . . .

Q. All of the figures then that are seen on here are brokerage?

A. Yes. . . .

Q. —and it purports to show the number of shipments on which brokerage was advanced and the figures have nothing to do with dollars at all but the figure 8,163 means that there were 8,163 different shipments upon which brokerage was advanced by the railroad company?

A. That's right. . . .

Q. And the other column is the number of shipments on which brokerage was not advanced—10,160?

A. Yes. . . .

Q. You didn't even handle them yourself?

A. I handled none of these applications for change in brokers. . . .

Q. But I'm trying—I'm thinking of a case where the broker specified isn't there to handle them and some other broker appears with the bill of lading. Take, for instance, a shipment sent to the Union Brokerage Company and the Union Brokerage Company has no man there to handle it for them and Jensen or Rime shows up; now, how does he acquire the right to handle that particular shipment?

A. The only way is by the connecting line taking it up with the shipper or the customs would not allow it to be entered. . . . ." (R. 83-88, 90).

Mr. W. F. Mackay, who is not only an honorable customhouse broker, but also possessed of an expert knowledge of the business and of the Tariff Act of 1930, as amended, testified for the Petitioner:

> "Q. Now, then, by stamping the invoice or signing the name of the broker to the invoice and leaving that with the bill of lading and—the original or duplicate then does the Collector dispatch an inspector to inspect the shipment to see— . . .
>
> A. No, he doesn't deliver the bill of lading; he delivers one copy of the invoice and a note on the back in some way that he has authority to clear that shipment, then the inspector goes out and makes an inspection of the shipment and the shipment is released, and, as far as the railroad is concerned, it goes forward.
>
> Q. In practice then that service of the broker aids the interstate and foreign commerce through the ports?
>
> A. Yes" (R. 111, 112).

The volume of the business done between July 1, 1940, and November 30, 1941, is indicated by Exhibit EEE (R. 399, 402).

Therefore, it is clear to the point of excluding all controversy to the contrary that the business of the customhouse broker is intimately connected with and a part of the foreign commerce between the Dominion of Canada and the United States, beginning at the point of origin in Canada, and continuing thereafter until the goods, consigned to him in Canada, have been cleared of United States Customs. Only when that service has been rendered may the goods be released for further transportation and delivery to the ultimate consignee.

SPECIFICATIONS OF ERROR

The Supreme Court of Minnesota erred:

1. In reversing the judgment of the District Court of Minnesota by holding that the Court had no jurisdiction over this cause of action because Petitioner had not obtained a Certificate of Authority to do business in Minnesota under the provisions of the Minnesota Foreign Corporation Act.

2. In holding in effect that Petitioner had no right to sue in the courts of Minnesota for the protection of its property notwithstanding the fact the the license granted to it by the Government of the United States expressly authorized it to do business in the County of the Forum.

3. In holding that a customhouse broker is not engaged in "commerce" within the purview of Art. I, Sec. 8, clause 3 of the Constitution of the United States.

4. In holding that the Minnesota Foreign Corporation Act does not burden, nor obstruct or interfere with the free flow of foreign commerce.

5. By holding in effect that Petitioner's business has no substantial relation to foreign commerce, but is local and intrastate business, and that the constitutional power of Congress over foreign commerce is in no way impaired by the provisions of the Minnesota Foreign Corporation Act.

6. By adjudging that Petitioner's suit should have been dismissed on the ground that it had no Certificate of Authority to do business in Minnesota.

7. In denying Petitioner the privileges and immunities guaranteed by Art. XIV, Sec. 1 of the Constitution of the United States.

SUMMARY ARGUMENT

This appears to be the first case directly involving the relation of a customhouse broker and his business to the "commerce with foreign nations" and to the administration of the nation's tariff system. It is a case of national scope and importance because (1) the rights and duties of the Petitioner are identical with the rights and duties of all customhouse brokers in the 48 United States Customs Collection Districts; and (2) the protection due to importers, the revenue of the United States, and the control by the Treasury Department over its licensees are directly affected by the decision rendered by the Supreme Court of Minnesota and by the decision to be rendered by this Honorable Court.

The rights and duties of licensed customhouse brokers are defined and prescribed by Act of Congress, and by the Rules and Regulations promulgated by the United States Treasury Department by virtue of Congressional authority, and the authority inherent in the office of the Secretary of the Treasury.

Petitioner owes its existence, as a corporation, to the laws of North Dakota, but its power to do business as a licensed customhouse broker is wholly and absolutely dependent on, and controlled by, the laws and regulations of the United States.

The "mechanics" of our tariff system, together with the duties of the customhouse broker, as defined by the Tariff Act of 1930, as amended, and the Rules and Regulations of the Treasury, promulgated pursuant to laws of Congress lead to only one conclusion, namely, that the customhouse broker is an integral factor, an instrumentality, devised for use in the conduct of our foreign commerce, and that through the use of his services by the Government and the per-

formance by him of his functions the importers and the revenue of the United States are protected.

Congress alone is given the power to regulate commerce with foreign nations and among the several states. "The courts can never take the initiative" in this field.

Parkersburg & O. River Transportation Co. vs. Parkersburg, 107 U. S. 691, 701, 27 L. ed. 584, 588.

"To regulate commerce" means to foster, protect and control commerce for the welfare of those immediately concerned and of the public at large.

Mondou vs. New York, N. H. & H. R. Co., 223 U. S. 1, 47, 56 L. ed. 327, 345.

Texas & N. O. R. Co. vs. Brotherhood of R. & S. S. Clerks, et al., 281 U. S. 548, 74 L. ed. 1034, 1046.

"To regulate commerce" is not synonymous with the power to destroy or impair the flow of commerce between the United States and foreign countries.

United States vs. Joint Traffic Assn., 171 U. S. 505, 43 L. ed. 259, 288.

For "commerce" as used in the Constitution means "intercourse for the purposes of trade" and includes transportation, purchase, sale and exchange of commodities between the citizens of the different states.

Carter vs. Carter Coal Co., 298 U. S. 238, 298, 80 L. ed. 1160, 1182.

Welton vs. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 350.

Pensacola Teleg. Co. vs. Western U. Teleg. Co., 96 U. S. 1, 9, 24 L. ed. 708, 712.

Activities, intrastate in character when separately considered, are nevertheless under the control of Congress "if they

have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."

Schechter Poultry Corp. vs. U. S., 295 U. S. 495, 547, 79 L. ed. 1570, 1587.

Houston, E. & W. Texas Ry. Co., et al., vs. U. S. (Shreveport case), 234 U. S. 342, 351, 352, 58 L. ed. 1341, 1347, 1348.

There can be no closer relation of business activities to interstate commerce than is the case here. The enforcement of the Minnesota Foreign Corporation Act to the business of Petitioner delays, burdens and interferes with foreign commerce.

The Ports of Entry are so many "throats" through which the current of foreign commerce flows, in this instance, between the Dominion of Canada and the United States. If these throats become choked or obstructed, trade between these two countries becomes impaired, if not destroyed. Into to these throats are "fed" the currents of trade.

The goods which are lawful objects of importation between the two countries must be segregated from those not importable at the Ports of Entry. Those not importable are denied entry. The importable goods reach these throats for entry, and the Treasury Department exacts from these goods, with rare exceptions, the payment of the duty specified in the Tariff schedule before they are allowed to pass through these throats or Ports to their designated and ultimate destination. All these goods, exceeding $100.00 in value, whether subject to the payment of duty or not, must be "cleared" (Secs. 1481, 1482, Title 19, U. S. C. A.).

These goods arrive at the Port of Entry on board a common carrier for continuous transportation from the point of origin to the point of ultimate destination, under through

bills of lading. This "through" journey of the merchandise is by force of law interrupted at the Port of Entry, either temporarily or for an indefinite length of time, because, until the merchandise has been "cleared," the law places it in the custody of the Collector who acts for the Government of the United States to prevent importations contrary to law. This "seizure" and resulting custody is lifted when the carrier is allowed to proceed with the merchandise to the ultimate destination designated on the through bill of lading. This "lifting" is done only when the goods in the custody of the Collector have been inspected by the Collector or his agent and "entered." This "entry" may be made by the actual owner of the importations, or by the customhouse broker, who, if so designated on the bill of lading and waybill, is the owner of the merchandise in the custody of the Collector, so far as the Government is concerned, for purposes of clearance. The "entry" involves the payment of the duty, the identification of the merchandise with reference to the classification of the articles as defined in the Tariff schedule, a comparison with the invoice going with the bill of lading and waybill, the computation of the estimated duty, and the compilation of the required records for the office of the Collector and for the office of the broker for actual or potential use in the future.

If the broker has filed the required bond, duly approved, he has 48 hours in which to complete the "entry." This is allowed to give time for accurate compilation of the necessary records of each transaction, and is made possible or practicable because of the broker's bond which insures the Government against loss. The Tariff schedule is very complicated, and contains many exceptions from the general rules, affecting the computation of the estimated duty payable on the various goods accepted for importation. This 48 hour time helps to prevent errors in the computation,

and that time is used by the broker for completing the records of his entries as required by the Regulations.

The broker, in the interest of "commerce," is given the right to ask the carrier to advance his fees and the duty, both of which are then added to the carrier's own charges, the total in such cases being collected by the carrier from the actual owner or ultimate consignee at the point of destination.

When the broker who is the constructive owner has secured the inspection of the merchandise on board the train, but then in the "custody" of the Collector until "released," and the Inspector gives his approval, after the broker has shown his right to "enter" the goods, that is, shown his right to assume the liability to pay the estimated duty, and any additional amount of duty which later may be found due, to the satisfaction of the Collector, then the merchandise is released and the carrier is authorized to resume the interrupted journey (R. 111, 112). The bond on file with the Collector insures the discharge of the broker's liability, not on one or two shipments, but for all which he "enters."

This done, the broker proceeds, according to law and the Rules and Regulations, to prepare for his own office and for the office of the Collector the lists or clearance sheets, the reports, etc. These are some of the records which the law and the Regulations require the broker to keep available for the Government for at least five years (Sec. 8 (a), (b) and (g), Appendix II, *infra*).

The broker does not follow or handle the merchandise "cleared" after it has been released from customs except that if an error is discovered in the computation of the duty which warrants it he may get the shipment recalled to the custody of the Collector for one or more purposes specified in the law.

This is the business of a customhouse broker, whether the

broker be an individual or a corporation. This was the sole business of the Petitioner. The Record shows no other, and no other is claimed. The estimated duty is computed and paid at the broker's risk since the Collector is immune from liability under the terms of the Tariff Act of 1930, as amended (Sec. 1513, Title 19, U. S. C. A.).

The actual owner has the right to "enter" his own importations; but the existence of this right, and even its use by those who choose to exercise it, cannot, and does not, alter the inherent nature and characteristics of the business of a customhouse broker. The actual owner of the importations may experience difficulty in making a satisfactory entry, since he, too, if he does "enter" his merchandise, must compute, at his peril, the duty required immediately, and potentially in the future, on his importations. He may be delayed in making his "entry" by accident or sickness. But again these possibilities do not change the business of Petitioner as a licensed customhouse broker.

It is thus too obvious to require demonstration, or even explanation, that the business of the customhouse broker expedites and speeds the flow of foreign commerce and promotes the safety of the revenue of the United States. Without these services these commerce throats would become choked from the continuous flow of foreign commerce and would seriously retard trade, if not kill it, between the two countries. It is equally self-evident that without the service of Petitioner, leaving each importer to make his own "entries," the free flow of foreign commerce would be seriously retarded and impeded, and the revenue of the United States subjected to actual and ruinous hazards, with disastrous results.

Consequently, Petitioner respectfully insists that it, whose business is that of a licensed customhouse broker, is an "appliance," an "agent," an "adjunct," an "instrumentality," a

device created by Congress and employed by the United States to keep the flow of foreign commerce moving efficiently, and to protect the revenue of the United States. Its business is a definite, inseparable part of the foreign commerce within the purview of Art. I, Sec. 8, clause 3.

The power of Congress over "commerce" includes all instrumentalities and every device that may be employed to promote trade between nations and protect the revenue of the United States.

Swift & Co. vs. United States, 196 U. S. 375, 40 L. ed. 518.

Stafford vs. Wallace, 258 U. S. 495, 66 L. ed. 735.

Lemke vs. Farmers' Grain Co., 258 U. S. 50, 66 L. ed. 458.

Petitioner is such an instrumentality or device employed in foreign commerce.

Where a corporation is engaged in interstate or foreign commerce it may enter and transact business in any state without state interference or restraint.

Pensacola Telegraph Co. vs. Western Union Telegraph Co., supra.

Crutcher vs. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652.

Sioux Remedy Co. vs. Cope, 235 U. S. 197, 59 L. ed. 193, 196.

The liability to pay taxes in the state where the business is done is not a controlling test by which to determine whether a business is interstate or intrastate. A state is without power to lay a tax which amounts to a burden on interstate and foreign commerce.

Panhandle Oil Co. vs. Mississippi, 277 U. S. 218, 72 L. ed. 857, 56 A. L. R. 583.

Yet unless the tax "is a direct obstruction to the exercise of Federal powers" over commerce, it may be levied on the property of natural persons or of corporations. In *Union P. R. Co. vs. Peniston*, 18 Wall. 5, 33, 36, 21 L. ed. 787, 792, 793, the Court said:

> "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such agent. . . . It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. . . ."

(Quoted in *James vs. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 169.)

The inhibitions of the Minnesota Foreign Corporation Act is a direct burden on commerce.

Deductions from "non-action" by Congress, and state legislation during that hiatus, under the police power of the states, affecting interstate commerce, are immaterial here because in the field of customhouse brokers and foreign commerce Congress has acted, and since Congress has acted its action is paramount, and exclusive.

The Gulf, Colorado & Santa Fe Railway Co. vs. Hefley & Lewis, 158 U. S. 96, 104, 39 L. ed. 910, 912.

Chicago, Rock Island & Pacific Railway Co. vs. Hardwick Farmers Elevator Co., 226 U. S. 426, 57 L. ed. 284.

We do not believe that the customhouse broker is an "independent contractor." He is a "person" able to render a specialized service furnished by the Government to those en-

gaged in foreign commerce to assist in executing the rules established for the regulation of foreign commerce, and to act as a medium for the collection of the public revenue.

The basic element denoting an independent contractor is the fact that the contractor has an independent business or occupation. An independent contractor "is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work."

Par. 2. *Independent Contractors*, 27 *Am. Jur.*, p. 481, citing *Casement vs. Brown*, 148 U. S. 615, 37 L. ed. 582.

The customhouse broker may be said to have an independent occupation, but he may not run his business according to his own method nor without Government control. He has no contractual relation with the shipper or with whomsoever is the real author of his designation as customs broker on the bill of lading attached to the goods which arrive at the Port for clearance. His license, together with his designation as the broker on the bill of lading, create an implied contract under which he is empowered to demand and receive pay for his services for each entry he makes from either party to the importation; but the methods used in rendering that service are prescribed to the minutest detail by the Federal Government.

The Government presumably exercises care and discrimination in passing on, and in granting, the license applied for in accordance with Rules and Regulations prescribed by the Secretary of the Treasury, not by him or by the shippers or importers. While licensed he is invested with a lien on imported merchandise for duties paid by him and for his fees. He is, in the estimation of law, the owner of the goods which

arrive at the Port under the bill of lading which designates him as customhouse broker.

And, while licensed, the shipper or the importer, or both acting together, cannot "fire" him for cause or on notice. The only method available for dispensing with his services and to disengage him from his business is either to designate some other broker to enter the goods, or for the importer to go to the Port and clear his own importations, or to file charges against him with the Secretary of the Treasury for the revocation of his license (19 U. S. C. A., Sec. 1641). When such a proceeding is instituted the law gives the broker an appeal from an adverse decision to the United States Circuit Court of Appeals for the Circuit to which he belongs (19 U. S. C. A., Sec. 1641).

The licensed customhouse broker performs his services at the Port where he works when and while the Government receives goods moving in foreign commerce for the purpose of determining whether they are importable, and if importable, whether exempt from or subject to the payment of duty, and if the latter how much, provided the bill of lading names him as the broker for entry purposes.

The common carrier, engaged in foreign and interstate commerce, is temporarily "at rest" by force of law at the Port of Entry and the goods to be entered are thus temporarily interrupted in their journey solely for the purpose of satisfying the money demands made by the Government as the price for entering the United States. The "broker," governed by Rules of the Government, assembles the data, presents them to the Collector for appraisement of the goods on board cars and in the Collector's custody that the amount of the duty to be paid as a condition for the further progress of the goods in their appointed journey may be determined and paid. He then makes the records, and secures the release of the goods from the custody of the Collector. The

broker's business is a specialized service for which he is allowed to charge compensation; but that specialized service is furnished by the Government to those engaged in foreign commerce for the protection of the importers and the revenue of the United States. The right to render this specialized service is wholly within the control of the Secretary of the Treasury.

But even if the customhouse broker be an independent contractor the result is the same. For the nature of the act rather than the person of the actor is decisive.

Puget Sound Stevedoring Co. vs. Tax Commission, 82 L. ed. 68.

Therefore the argument in this case reduces itself into this formula:

1. The business of Petitioner is not only so intimately related to, but so connected with, foreign commerce that it is under the exclusive control of Congress irregardless of the fact that the conduct of its business is done in Minnesota and not in North Dakota.

2. The Minnesota Foreign Corporation Act subjects a North Dakota corporation to burdens which interfere with foreign commerce.

3. Therefore the decision of the Supreme Court of Minnesota, which sanctions and approves that effect of the inhibitions of the Minnesota Foreign Corporation Act on the business of Petitioner violates its constitutional rights. The decision of the Minnesota Supreme Court must accordingly be reversed and the judgment of the District Court be reinstated.

ARGUMENT

(Note: In the following argument Exhibit A means the "Rules and Regulations Relating to Customhouse Brokers" *and not the memorandum agreement* (R. 17) attached to the complaint. The stipulation of the parties defining the Record for this Appeal refers to the Rules and Regulations as Exhibit A. The most pertinent parts of the Rules and Regulations, Exhibit A, are found in Appendix II, *infra*.)

This is what we believe is called a case of first impression. The Supreme Court of Minnesota did not find a decision, nor did we, which directly deals with the present problem. A few cases deal indirectly with the functions of the office and business of customhouse brokers. In one case, *In re Landeck & Merrill*, 20 Fed. (2nd) 249, 250, the Court stated that a customhouse broker is the agent of the Treasury Department; but that statement was probably unnecessary to the adjudication of the issue actually involved in that case. In another case, *Duluth, S. S. & A. Ry. Co. vs. Wilson*, 167 N. W. 55, the Court found that the contract in controversy between the plaintiff and the defendant in that case involved the disposition of the fees arising from the employment. A third case, *People ex rel. Tower v. State Tax. Comm.*, 282 N. Y. 407, 26 N. E. (2nd) 955, involved the question of the customhouse broker's liability to pay a corporate franchise tax measured by net income. Still another case, *State vs. Wm. J. Oberle, Inc.*, 190 La. 1053, 183 So. 347, involved the question of the customhouse broker's liability to pay a state occupational tax. None of these cases, nor any other case found, deals directly with the present problem. Never before has the relation between the business of a customhouse broker and "commerce" between the United States and the Dominion of Canada, or any other foreign country, been directly involved.

There is no serious dispute, if any, about the material facts bearing upon the central issue in this cause.

The determination of the issue in the instant case rests primarily upon the construction of the sections of the Tariff Act, as amended, found in Appendix III, *infra*, and hereafter considered, and on the "Rules and Regulations" promulgated by the Secretary of the Treasury by virtue of those provisions of law applied to the broker's business activities (Exh. A).

The following facts are not disputed:

1. Petitioner was, during the time here in question, and for some years before, a North Dakota corporation (R. 124).

2. Continuously since March, 1928, Petitioner has been duly licensed by the Government of the United States as a customhouse broker pursuant to the provisions of law (R. 124, 1).

3. This license covers the Dakota District or United States Customs Collection District No. 34. This district embraces as its area Kittson County in Minnesota and the States of North and South Dakota. There are several Ports of Entry in this district, among which are the Ports of Portal, North Dakota, and Noyes, in Minnesota (R. 126).

4. By September 6, 1938, Norman G. Jensen, one of the Respondents, had been doing customhouse brokerage business as an individual for about a year. By that date he had acquired a few clients and a small business.

At that same time the two controlling stockholders and directors of the Petitioner, Mrs. Annie Kramer and Mrs. Nan W. Anderson, had lost their husbands, rendering them dependent on strangers for the operation of their customhouse brokerage business, run as a corporation, because they were not qualified to operate it themselves. The business of Petitioner had been and was prosperous (R. 126, Exh. B).

5. On September 6, 1938, Petitioner bought the business of Mr. Jensen for 25 fully paid up shares of Petitioner's authorized and issued capital stock, then actually worth more than $2,500.00, for a salary of $250.00 a month plus his necessary business expenses, and his proportionate part of the net earnings. The total outstanding stock was $10,000.00 (R. 127, 129, Exhs. B-1, B-2 and C).

In addition, this purchase and sale of his business called for Mr. Jensen's immediate election as director, president, treasurer and manager of Petitioner and its property.

Petitioner carried out its part of this bargain. Mr. Jensen immediately assumed the duties of the offices to which he was elected as a part of that bargain and took charge and control of Petitioner's property and business. All this was done on September 6, 1938. He was re-elected in 1939 (Exh. B).

6. The business bought from Mr. Jensen was like its own, a customhouse brokerage business. *He retained his insurance business and the brokerage business at Northgate* (Italics supplied). Petitioner's business has remained such ever since. No claim is made that Petitioner has been engaged in any business other than that of a customhouse broker.

7. On July 1, 1940, practically all of the customhouse brokerage business theretofore done at Portal, North Dakota, was transferred to Noyes, Minnesota, which also is in the district covered by Petitioner's license. This transfer occurred because the Canadian Pacific Railway on that date put into effect the routing of freight shipments forwarded by Petitioner's clients and others from Canada into the United States through the Port of Noyes, instead of through Portal (R. 130, 131).

8. When Mr. Jensen sold his customhouse brokerage busi-

ness to Petitioner on September 6, 1938, his license as customhouse broker became committed to the use by Petitioner for supporting and maintaining its license as a customhouse broker. Two officers of a corporation doing business as a customhouse broker must be individually licensed (R. 49, 50, Sec. 1 (c), Exh. A).

9. When the customhouse brokerage business became transferred to Noyes, Mr. Jensen was one of the individually licensed officers of Petitioner, and he was also one of Petitioner's directors, its president, treasurer and manager. Two days before this transfer of the brokerage business from Portal to Noyes in District 34 became effective, Mr. Jensen opened an office in Noyes to handle the transferred brokerage business at Noyes, beginning July 1, 1940. By that time he had trained Mr. Rime in clearing importations and he appointed him his agent on June 29, 1940. Mr. Jensen executed and filed with the customs the necessary power of attorney, authorizing Mr. Rime to act as his "agent" in "clearing" merchandise coming through Noyes from Canada. Mr. Jensen also directed, in writing, the chief clerk of the two railways, the Soo and the Great Northern, at Noyes, to deliver to Mr. Rime the invoices and bills of lading coming to Noyes to be cleared by Mr. Jensen or the Petitioner (Exh. Q, R. 132).

In addition, he furnished Mr. Rime with a stamp bearing Mr. Jensen's name, for use in conducting the brokerage business he thus started at Noyes, Minnesota, to handle the rerouted shipments of importations consigned to Petitioner for clearance. He found this stamp useful because it made the change look official. Jensen and his attorney in fact used this stamp to change the carrier's certificate on the bills of lading to read consigned to Norman G. Jensen instead of to the Petitioner. Thus the original consignment of the shipment was diverted from the Petitioner to the Re-

spondent by changing the original directions of the originating shipper. Bills of lading, consigning shipments of merchandise to Petitioner, delivered by the railway companies at Noyes to Mr. Jensen or his agent, Mr. Rime, were changed by them either at Noyes, Minnesota, or at Emerson, in Canada. Mr. Rime testified that he took these bills of lading back to the agent of the Canadian Pacific Railway at Emerson, in Canada, and there changed them by the use of the rubber stamp in the Emerson office (R. 132). When this change had been effected, Mr. Rime, as a rule, presented the altered papers to "customs" as true and genuine evidence of Mr. Jensen's right to clear the shipments which had been consigned at the point of origin to Petitioner for clearance.

In their greed and haste to take Petitioner's business, the Respondent wrongfully and maliciously circumvented the rule stated so clearly in *Harris vs. Dennie*, 28 U. S. 292, 7 L. ed. 683, 687, 688. The statute on the subject in force now is essentially the same as those found in the Revenue Collection Act of 1799, Ch. 128. Justice Story, speaking for the Court in that case, said:

> "From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act. . . .
>
> No person but the owner or consignee, or, in his absence or sickness, his agent or factor in his name, is entitled to enter the goods at the customhouse, or give bond for the duties or pay the duties (Secs. 36, 62). Upon the entry the original invoices are to be produced and sworn to, and the whole object of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry."

The Respondents were strangers to these goods when they arrived at the Ports of Exit and Entry under bills of lading

running to Petitioner, as consignee. Converting those bills of lading at either Port into carriers' certificates falsely naming Norman Jensen as the consignee was to defeat the Tariff Act and the rights of Petitioner by the alteration of instruments used for the conduct of foreign commerce.

A few extracts from the testimony in the Record will illustrate and support these statements.

Mr. Jensen testified:

"Q. The usual and the regular and the legal way for handling merchandise shipped into the United States is this, is it not, the shipper in Canada attaches to the car an instrument called the waybill, and in addition, attaches bills of lading, which designate the broker in the United States who they entrust with the handling of that shipment, isn't that right?

A. They do that.

Q. And that bill of lading consigns the shipment to the customs broker at the Port of Entry?

A. That's right" (R. 50).

Mr. Rime testified:

"Q. Whatever there were (bills of lading, etc., consigning shipments to Petitioner) were taken over (to Emerson, Canada) by you or Mr. Jensen, isn't that right?

A. Yes.

Q. And you understood and admit now that you were able to do that because of that paper (Exh. Q) that Mr. Jensen had left with the chief clerk on the 29th of June, 1940?

A. I know that now, yes. - - -" (R. 97).

"Q. And those shipments or the evidences of such broker's consignments were taken over to the C. P. R. by you or by Mr. Jensen, isn't that right, through (to) the Canadian side?

A. That's right.

Q. And there you prevailed or secured the prevailed upon the officials of the C. P. R. or secured their consent to have the certificates changed on those bills of lading so that you could make entry?

A. – – – Oh, yes, I did.

Q. Yes,—and you understood all the time that without such change you couldn't under your power of attorney or Mr. Jensen couldn't use—couldn't under his license broker those shipments?

A. That's right. – – –

Q. Why did you resort to that practice?

A. Because they refused to allow me to make entry at the customhouse.

Q. That is, the customs officials refused to let you act as broker on the shipments consigned to the Union Brokerage Company?

A. Yes.

Q. And so to avoid that regulation, you did, and Mr. Jensen did what you have just described?

A. Yes" (R. 98).

Mr. Rime delivered the stamp gotten from Mr. Jensen to the official at Emerson. That stamp had the name of Norman G. Jensen on it (R. 98, 99).

That practice has prevailed since July 1, 1940. The bill of lading consigning the merchandise to Union Brokerage Company had to be changed in order that entry might be made in the name of Norman G. Jensen (Exh. KKK, R. 120).

During these developments, and until he was asked to resign, Mr. Jensen, as stated, held the offices mentioned, and drew his pay from Petitioner. He admitted that he "received a monthly salary from the Union Brokerage Company" (R. 56, 66).

"The number of papers was so considerable coming in that manner that in the interest of time saving" the stamp was used to put Jensen's name on them and that this was done under Mr. Jensen's directions (R. 102, 103).

Where Mr. Jensen was required by the law and Regulations, as well as by the plainest principles governing a fiduciary, to act the part of a man of integrity, he resorted to "cunning and craft," using bills of lading, carriers' certifi-

cates, invoices and waybills—all instruments of foreign commerce—to defeat the interests entrusted to him by the Petitioner and to divert that foreign commerce into his own "lap" for his own profit at the expense of his principal, while his associate directors were known to trust him. The instruments designed by Congress to evidence honest business intercourse between the two nations were perverted into instruments of fraud.

The number of shipments cleared between July 1, 1940, and November 30, 1941, was in the neighborhood of 19,000 (Exh. EEE, R. 81).

This transfer or conversion of Petitioner's business was artfully concealed from Petitioner for about three months (R. 133).

10. On November 5, 1940, Mr. Jensen's faithless conduct had been discovered, and he was requested to resign from the offices he held. He did.

11. In 1941 Petitioner brought the suit out of which this cause has arisen.

12. The customhouse broker's business is the creature of the laws of Congress. The right of an individual, association or corporation to engage in that business wholly depends on the issuance of the license authorizing him, them or it to engage in that business. The right to issue the license is committed by Congress to the Department of the Treasury. That license, when once granted, may be revoked by the same authority, and, if revoked, the right to engage in that business ceases (Secs. 10, 11, Exh. A).

The conduct and operations of a broker's business are likewise prescribed, regulated and controlled by the Treasury Department in accordance with Acts of Congress. The profits derived by a broker from the business wholly depends on the importations consigned to and received by him

for clearance. Foreign commerce is the only source and fountain of the broker's business, and the Tariff Act of the United States, together with the Rules and Regulations of the Treasury, adopted to foster trade with foreign nations and to protect the revenue of the United States, measure, direct and control the activities of the customhouse broker in the conduct of his licensed business. He cannot go beyond or below these rules, for if he exercises any powers of discretion or fails to observe accurately, the Government rules he does so at his peril. These claims are amply supported by the evidence.

Exhibit A, which is the compilation of the Rules and Regulations Relating to Customhouse Brokers, was offered and received in evidence (Original R. 56). Its material provisions are found at pages 5-9, both inclusive, Appendix II, *infra*. Sec. 1 thereof recites that

> "except as provided in subdivision (c) of this section, no person shall transact business as a customhouse broker without a license granted in accordance with the provisions of this subdivision."

except that importers may clear their own importations without a license.

Sec. 1 (b) prohibits the Treasury Department from doing business with a person conducting a customhouse broker business without a license.

Whoever desires to engage in the business of a customhouse broker must "submit an application to the Committee," under oath, for a license, "stating his qualifications" therefor. The form of the application is prescribed by the Committee on Practice, and approved by the Secretary of the Treasury. Before such an application is granted the Committee on Practice of the Treasury Department investigates the applicant "and to this end may utilize any investigative facility of the Treasury Department." Factors to be taken into account in granting the application for the license

"shall cover, but need not be limited to (1) the correctness of the statements made in the application, (2) the business integrity of the applicant, and (3) when the applicant is an individual (including an officer of a corporation or association or a member of a partnership), the character and reputation of the applicant and his experience in customs matters" (Sec. 3 (b), Exh. A).

When and if the application for the license is granted the name and address of the applicant

"shall be posted conspicuously in the customhouse at the port where the applicant proposes to maintain his principal office. In the case of a corporation . . . the name of the licensed officers or members shall be stated" (Sec. 3 (c), Exh. A).

Sec. 3 (d), Exhibit A, recites the "causes sufficient to justify rejection of an application."

Sec. 5, Exhibit A, further provides that

"a licensed customhouse broker requires no further enrollment under these regulations for the transacting within the customs districts in which he is licensed, *of any business relating specifically to the importation or exportation of merchandise under customs or internal revenue laws*" (Italics supplied). He is also entitled, without further license or enrollment, to represent claimants or other persons before the Treasury Department in Washington in any matter in which he acted as a customhouse broker in any district in which he is licensed."

The Supreme Court of Minnesota overlooked this last provision of the "Rules" because it was led into making this erroneous statement:

"He (the customhouse broker) cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the department" (R. 153).

The Rules are to the contrary.

Sec. 7, Exhibit A, defines the conditions where a license is not required for the clearance of merchandise.

Sec. 8, Exhibit A, relates to the books and papers which the licensed customhouse broker must keep and maintain. Thus he

> "shall maintain correctly and in orderly itemized manner, and keep current, records of account of all financial transactions as a customhouse broker"

and

> "keep and maintain on file a copy of each entry made by him, and copies of all his correspondence and other papers *relating to his customs business*" (Italics supplied) (Sec. 8 (b), Exh. A).

Sec. 8 (c), (d), (e) and (f), Exhibit A, define the form of the records to be kept, and the form of authorized substitutes.

Sec. 8 (g), Exhibit A, requires the customhouse broker to keep the books and papers relating to his business "for at least five years," and to maintain them "in such manner that they may be readily examined. Any or all of such books and papers shall be made available to duly accredited agents of the United States on demand therefor within five years after their preparation or receipt by the broker. The broker shall furnish such additional information regarding his activities as a licensed customhouse broker as such agents may require."

The examination of the books and papers is required to

> "determine whether or not the broker is complying with the requirements of this section. Furthermore, the supervising customs agent or any duly accredited agent of the United States designated by him may at any time, *for the purpose of protecting importers or the revenue of the United States*, inspect such books and papers to obtain information regarding specific customs transactions" (Italics supplied) (Sec. 8, (h), Exh. A).

Additional duties and obligations may be imposed on the licensed customhouse broker by the Secretary of the Treasury (Sec. 9 (a), Exh. A).

Subdivisions (c), (d), (e), (f), (g), (h), (i), (l), (n), (o), (p), (r), (s) and (t), Sec. 9, Exhibit A, state the prohibitions relating to the conduct of his business by the licensed customhouse broker.

Subdivision (j) of Sec. 9 commands the licensed customhouse broker to "advise his client promptly" of any error or non-compliance chargeable against him; and subdivision (k) commands the broker to use due diligence in ascertaining and imparting information to his clients with reference to any customs business; and subdivision (m) of Sec. 9, Exhibit A, provides:

> "Each licensed customhouse broker shall promptly pay over to the Government when due all sums received for the payment of any duty, tax, or other debt or obligation owing to the Government, and shall promptly account to clients for funds received for them from the Government, or received from a client in excess of the governmental or other charges properly payable *in respect of the client's customs business*" (Italics supplied).

The license of a customhouse broker may be revoked, and the law, Rules and Regulations governing such revocation are declared in Sec. 10, Exhibit A. If revoked his right to do business ends.

We believe that this Court takes judicial notice of Rules and Regulations made and approved by the Interstate Commerce Commission governing the transportation of freight traffic. On this assumption we call attention to Supplement No. 36 to G. N. Ry., I. C. C. No. A-7862, which provides that

> "carriers parties to this tariff will, on request, advance accrued charges incidental to the transportation of freight tendered for shipment, as follows:
>
> . . .
>
> Customs fees and brokerage fees on import and bond-

ed freight, duty charges at the Canadian boundary. . . . (p. 7, G. N. Ry., G. F. O. No. 440-M).

The superseded Rules and Regulations have carried the same concessions at least since 1939.

I. C. C. No. 6964, pertaining to the operation of the Soo by the trustees of that system, on page 4, provides:

"Agents are also authorized to advance charges on the following:

. . .

Customs fees and brokerage fees on import and bonded freight. Duty charges at the Canadian boundary. . . ."

The here material parts of Title 19, U. S. C. A., relating to Customs Duties, are found in Appendix III, *infra*.

Sec. 1 confirms the reorganized customs service set up on March 3, 1913, as the permanent organization.

Sec. 2 authorizes the president to rearrange the several customs collection districts, provided the number shall not exceed 48, without Congressional authority. No rearrangement has been made affecting the Dakota District which is but another name for United States Customs Collection District 34.

Sec. 197 is the law governing the kind of money in which duties upon imports may be paid. This section embodies the duty imposed on the customhouse broker by Sec. 9 (m), Exhibit A.

The significance and practical value of this and other provisions of the Tariff Act are appreciated when it is recalled that "duties due on goods imported constitute a personal debt due the United States from the importer, although there exists a lien on the goods and a bond for the payment of the duties."

Meredith vs. United States, 38 U. S. 486, 10 L. ed. 258.

The broker, taking the place of the importer, and furnishing a bond in the amount and containing the conditions prescribed by the Secretary of the Treasury, makes the United States practically immune against loss which otherwise would be suffered, and at the same time hastens the release of the merchandise from the custody of the Collector for the benefit of the United States.

Sec. 232 defines the word "port" as "any place . . . at which merchandise can be imported."

Sec. 1481 deals with the subject of invoices, their contents, in the case of merchandise to be imported into the United States, and what must be shown, "to a proper appraisement, examination, and classification, of the merchandise that the Secretary of the Treasury may require."

The entries which the Rules and Regulations require the licensed broker to make, file and keep must disclose the facts so required to appear on the invoices of the merchandise consigned to him for clearance.

The conclusive interest of the United States in the business of the broker is shown by the facts (1) that he deals only in matters of foreign commerce, and (2) that Congress has covered this subject by "penal provisions concerning false invoices, entries, etc.," found in Secs. 1591, 1592 and 1593 (a) of Title 19, and Sec. 126 of Title 18, U. S. C. A.

Sec. 1482 deals with certified invoices and certification in general, all relating to goods moving in foreign commerce.

(Sec. 338, Title 19, U. S. C. A., requires a declaration to the consul as to the Port in the United States at which the merchandise is to be "entered." This adds force to the fact that the goods entered by the broker are recognized from the inception of their journey to be moving in foreign commerce.)

Sec. 1483 declares that

"all merchandise *imported* into the United States shall be held to be the property of the person to whom the same is consigned; . . .; and

A person making entry of merchandise under the provisions of subdivision (h) or (i) of Sec. 1484 (which relates to entry on carrier's certificate and on duplicate bill of lading respectively) shall be deemed the sole consignee thereof" (Italics supplied).

So, when the Respondents removed the bills of lading representing merchandise consigned by exporters in Canada to Petitioner for importation into the United States and substituted for them carriers' certificates, they were able to produce what, on their face, appeared to be genuine title papers authorizing them to clear those shipments which had been originally consigned to Petitioner, so long as that change and alteration was effected out of sight of the Collector and his agents at the Port of Entry.

The object of this section is to prevent frauds on the Government "arising from collusive transfers."

Lafontan vs. Elting, 54 Fed. (2nd) 664, reversed on other grounds.

The consignee is treated as the owner and importer.

Meredith vs. United States, supra.

The broker, on making the sworn declaration for entry of the goods, in which he declares himself the consignee, becomes chargeable with additional duties (see Exh. DDD).

Sec. 1484 deals with the entry of merchandise imported, and requires that "the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe." That is, Petitioner, if the consignee in a bill of lading attached to merchandise shipped from Canada, destined for the United

States, or its designated agent, in such case "shall make the entry."

This entry "shall be made at the customhouse" as a rule.

But "no merchandise shall be admitted to entry" ". . . without the production of a certified invoice therefor," subject to certain exceptions.

"The consignee shall produce the bill of lading when making the entry" subject to stated exceptions. If "no bill of lading has been issued" the Collector is authorized to accept other evidence; and a bond may be required for the production of the bill of lading later.

> The "entry shall be signed by the consignee, or his agent, and shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, appraisement and liquidation, and shall be accompanied by such invoices, bills of lading, certificates and documents as are required by law and regulations promulgated thereunder."

Sec. 1484 also by subdivision (h) defines when and how a carrier's certificate may be used in lieu of a bill of lading; and subdivision (i) of that same section prescribes the conditions under which duplicate bills of lading may be used for making entry.

Sec. 1485 deals with the declaration and the form and contents thereof "to be prescribed by the Secretary of the Treasury."

Subsection (4) states the liability of the consignee for increased duties. He escapes liability for "any additional or increased duties if" he meets the three conditions there stated. These conditions are cumulative and not separable, so that compliance with one of the three conditions does not have the effect of relieving him of the additional duties which may be assessed after the estimated duties have been paid. Particular attention is called to the third condition, namely,

the condition that if the ultimate consignee or owner of the importation, declares within 90 days that "he will pay all additional and increased duties" the broker becomes released if the other two conditions have been satisfied. Emphasis is also placed on the last sentence which is that "such owner shall possess all the rights of a consignee" or broker. If these three conditions are not satisfied by the broker he must pay or forfeit heavy penalties as provided by law arising on account of the importation, through foreign commerce, of goods into the United States.

Sec. 1490 deals with "incomplete" entries and authorizes the taking of the merchandise arriving at the Port into custody "to be held at the risk and expense of the consignee. . . ."

Sec. 1489 (omitted from Appendix III), Title 19, U. S. C. A., regulates the determination of "additional duties" where the appraised value exceeds "the entered value." In cases of this kind the consquences may be severe, and good faith is usually no defense. The broker is liable for these unless the conditions mentioned are used to relieve him of liability.

An entry is not complete until payment is made of the estimated duties.

Sec. 1505 provides that at the time of making the entry the "consignee," who is, as a rule, the broker, shall pay "the amount of duty estimated to be payable thereon." This "estimated duty" is computed by the broker, subject to correction as provided in that section, and if additional duty is claimed by the Collector, the consignee, whether he be the broker or the actual owner, must pay the additional duty demanded, and, where more than enough has been deposited, receive back the excess duties deposited for the estimated duty. In the latter case, he must refund the excess to his client. In the former he has the right to demand reimburse-

ment from his clients.

Sec. 1513 provides immunity for the Collector and other customs officers "to any owner, importer, consignee or agent, or any other person for or on account of any rulings or decisions as to the appraisement or the classification of any imported merchandise or the duties charged thereon. . . ."

Sec. 1641 gives authority to the Secretary of the Treasury to prescribe rules for the licensing of customhouse brokers, and for the revocation of licenses granted to brokers. It is to be observed that this section of the law specifically provides that

> "the Secretary of the Treasury may prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations . . . *and may require as a condition to the granting of any license, the showing of such facts as he may deem advisable as to the qualifications of the applicant to render valuable service to importers and exporters*" (Italics supplied).

Acting on this authority of law, the Treasury Department compiled and issued the Rules and Regulations Relating to Customhouse Brokers, Exhibit A, Appendix II, *infra*. These Rules and Regulations are designed to protect commerce against dishonest, incompetent and crafty customhouse brokers; to protect the revenue of the United States and to empower the officials, charged with the duty of protecting both the commerce and the public revenue, to remove the faithless and incompetent brokers from contact with the flow of "commerce."

The underlying theory of all these provisions is stated in Par. 97, "Customs Duties," 25 C. J. S., p. 254, in this language:

> "In order to prevent frauds on the revenue through collusive transfers, and to save the government the trouble and inconvenience of hunting up the ultimate

consignee, it has from the earliest acts been provided that an importation shall, for the purposes of the tariff acts, be deemed and held to be the property of the person to whom the same is consigned, unless the consignment is unauthorized, even though the holder is but a customs broker or a forwarder."

As customhouse broker, Petitioner was and is licensed by the Federal Government only to aid in matters of foreign trade, commerce, and navigation for the protection of the revenue of the United States and for the welfare of the importers.

Is This Business Foreign and Interstate Commerce?

Reduced to its lowest denominator the present problem is this: Is the customhouse brokerage business, carried on and conducted under compulsion of these Acts of Congress and the Rules and Regulations of the Treasury Department, regulating and controlling the nation's foreign commerce, local and intrastate commerce? or is it foreign and interstate commerce?

Notwithstanding the close, and also exclusive, relationship of Petitioner's business duties and activities to the commerce between the Dominion of Canada and the United States, the Supreme Court of Minnesota said:

". . . The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff *in a substantial way interfere with or obstruct the exercise of the granted power of Congress to regulate interstate commerce*" (R. 152).

"In applying this principle, so recently enunciated by the Supreme Court of the United States to the facts here presented it is necessary to consider the character of the business in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. . . .

". . . It (the Petitioner) had nothing whatever to

do with the actual importation or exportation of articles of commerce . . . . They receive no fees or emoluments from the federal government. . . . We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. . . . He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. . . . We fail to see how such a broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement (obtaining a certificate of authority to do business in Minnesota before suing in her courts) is not an obstruction or interference with interstate commerce. . . .

"The commission men in the Wallace case (*Stafford vs. Wallace*, 258 U. S. 495, 66 L. ed. 735) had actual contact with the movement of the commerce itself, and it was clearly a matter of interstate concern affecting all of the states alike. *In the instant case, the matter of public policy or public concern is not involved.* (Italics supplied.) . . . We therefore feel that the Wallace case is not in point here" (R. 152-154).

The District Court of Minnesota, on the other hand, found from the evidence in the case this fact:

"5.

That the principal function of customhouse brokers, as far as herein concerned, is that of making entry of shipments of goods entering the United States from the Dominion of Canada, paying the customs duty imposed on such shipments, and clearing the same so that they may continue on their course to their ultimate destination with the least possible loss of time; that in making entry shipments are consigned on bills of lading by the shipper to the customhouse broker chosen by such shipper; that a copy of such bill of lading is thereafter delivered to the broker by the carrier or mailed directly to him by the shipper; that upon receipt of such bill of lading by the broker the same is presented to the collector of customs and thereupon the duty due the United States is determined by the collector of customs and paid by the broker, whereupon the shipment is cleared and permitted to proceed to its ultimate destination and

consignee; that the customhouse broker, so acting, is considered, for the purpose of making such entry, the actual consignee, and acts as the agent of the shipper in making such entry; that in clearing said shipments he aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States; that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada" (R. 125).

Consider now some indisputable facts in the case and some of the settled principles of law.

These regulations of the Treasury Department, and acts of Congress, are undeniably regulations of commerce. The power of Congress to regulate foreign and interstate commerce is not confined to movements of goods and persons across state and national boundary lines. That power extends to whatever action becomes necessary to free and keep free from obstruction the lawful passage of commodities from state to state and between this and foreign nations.

The title to the goods, cleared by Petitioner as a customhouse broker, is invested in it, as a rule, when the common carrier accepts those goods in Canada for transportation to the importer in the United States. That title is granted subject to the rights of the United States to take the goods into custody when they reach the Port of Entry in order that the duty to be paid as a condition for their importation into the United States may be determined; computed and paid. On presenting to Customs satisfactory evidence that Petitioner, or its duly authorized agent, is possessed of that "title"—and that title is evidenced by the bill of lading, certified invoice, waybill, etc.—it may "enter" the goods, procure their appraisement where that is deemed necessary, pay the estimated duty, give consent to the payment of any additional

or increased duty, secure the inspection of the shipment of the goods, and secure their release from the custody of the United States so that the common carrier may proceed on its journey, thus interrupted at the border, to the designated destination. During all this time, and in any event up to the time the common carrier resumes the journey with the goods, Petitioner is the "owner" because it is the consignee of the goods in question. Either while in the Port, or, as is usual, during the next 48 hours—no longer—Petitioner has to make the report on forms prescribed by the Government for the regulation of "commerce" and for the levy of duties on the goods "entered" so that five or more years thereafter, and at any time in the interim, the Government may on the one hand recover the true duty where a mistake has been made in estimating the duty and on the other hand, check at any time the transactions of the broker for the purpose of supervising and controlling his dealings with his clients under his license for the protection of importers.

This in brief is the breadth and length of Petitioner's business, as it also is the extent of the business done by all other licensed customhouse brokers in the United States. That is, Petitioner is engaged exclusively in the business of handling goods which are a part of the "flow" of foreign commerce, and, through this its handling of goods moving in foreign commerce, the revenue of the United States is protected and the trade between the Dominion of Canada and the United States is fostered, accelerated, and freed from obstructions and embarrassing delay which would cripple the trackage and wharfage facilities of every Port beyond the possibility of comprehension. The Petitioner, as customhouse broker, due to the discriminating care intended to be exercised by the Government in the granting of licenses, is a member of a class which is able and permitted to render "specialized service," clearly and definitely identified with

foreign commerce.

Can anything be more a matter of public concern or policy than the revenue of the United States and the orderly flow of trade between the United States and a foreign country at peace with one another? The revenue sustains the life of our country, and orderly trade between our country and foreign nations is, to say the least, a substantial source of that life-sustaining revenue.

The fact that customhouse brokers "are not public officers" is wholly immaterial. The conductor, the engineer and the brakeman of the train carrying the goods consigned to Petitioner for clearance are not any of them public officers as here used; but, because they run the train which carries these and other goods from Canada into the United States they are engaged in foreign commerce. Nor is it of any significance that Petitioner's office was situated in Noyes, Minnesota, or that its records were kept there. The Government's records are also at Noyes, and the trains carrying the goods consigned to Petitioner for clearance stop at Noyes that Petitioner may do its work for the benefit of both Government and importers. Noyes is the location of the Port of Entry where Petitioner is listed according to law as one of the customhouse brokers, and where the goods moving in foreign commerce are stopped to remain there until Petitioner has rendered its specialized service according to the provisions of the Tariff Act and the Rules and Regulations of the Treasury Department. The Petitioner, then, is the "means" used to insure the payment of the duty and to dissolve the stoppage of foreign commerce at the Port and to enable the goods so stopped to resume their foreign commerce journey on board car of the common carrier transporting them from the Dominion of Canada into the United States under through bills of lading.

The nature of the act, that is, the service rendered and its

relation to commerce, rather than the person of the actor or his position or location, is decisive, for

> "'Commerce' in its broadest acceptation embraces not merely traffic but the *means* and vehicles by which it is prosecuted" (Italics supplied).
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> *Chicago & N. W. Ry. Co. vs. Fuller*, 84 U. S. 560, 21 L. ed. 710, 714.
>
> *Puget Sound Stevedoring Co. vs. Tax Commission of the State of Washington, supra.*
>
> *Southern Ry. Co. vs. Greenboro Ice & Coal Co.*, 202 U. S. 543, 50 L. ed. 1142, 1148.
>
> *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 243, 244.

The case of *Rock Island Plow Co. vs. Peterson*, 93 Minn. 356, 101 N. W. 616, presents a fact situation not out of harmony with the fact situation of this case. There plaintiff was a foreign or Illinois corporation "engaged in the business of manufacturing and selling agricultural implements." Defendant resided and did business in Red Wing, Minnesota, as a retail dealer in implements. Plaintiff's traveling salesman received from that defendant an order for merchandise, and the order given is set out at page 357 of the reported opinion. The goods were shipped by the plaintiff and accepted by the defendant. A contract had by that time been made and entered into between plaintiff and a warehouse company for receiving and storing goods shipped to it by the plaintiff, and under the storage agreement the warehouse company agreed "to transfer and reship goods promptly upon receipt of written orders from plaintiff. . . ." The goods ordered by the defendant were shipped to the warehouse and from there reshipped to the defendant at Red Wing. Thereafter as a part of a settlement between plaintiff and defendant the former received the note sued on. The defense was that plaintiff was a foreign corporation and that it had not complied with the "Somerville Law" which

is now known as the Minnesota Foreign Corporation Act, in that it had not obtained a Certificate of Authority to do business in Minnesota. The lower court in that case sustained that defense. The appeal followed.

On this fact situation the Supreme Court of Minnesota held among other things that "no presumptions are to be indulged in against plaintiff. The burden was upon defendants to show affirmatively a violation of the statute," and that the plaintiff in that case, having its place of business in Rock Island, Illinois, and all its books and records there, was engaged in interstate commerce, for which reason the Act did not apply.

"Commerce with foreign nations" comprehends every species of commercial intercourse.

Board of Trustees of University of Illinois vs. United States, 289 U. S. 48; 77 L. ed. 1025, 1028.

Even if Petitioner were engaged in intrastate business, its business is used in foreign commerce operations; and in such cases the intrastate business falls under the protective powers of Congress.

Houston, E. & W. Texas Ry. Co. vs. United States, supra.

Baltimore & O. R. Co. vs. Maryland, 88 U. S. 456, 22 L. ed. 678, 684.

The business here involved is national in character and stems from the administration of the Tariff Act of the United States, which requires a uniform plan of regulation. Congress, by the means exhibited, has provided both, and interference therewith by the State is prohibited.

Welton vs. State of Missouri, 91 U. S. 275, 23 L. ed. 347, 348, 349, 350.

Clark vs. Pigeon River Improvement Slide & Boom Co., 52 Fed. (2nd) 550.

Commerce includes not only the sale and exchange of goods, but comprehends all the initiatory and intervening acts and instrumentalities that bring about the sale or exchange of goods, and in determining the nature of a business as to whether it is intrastate or interstate courts look to practical considerations and the established course of business.

Foster-Fountain Packing Co. vs. Haydel, 278 U. S. 1, 73 L. ed. 147, 153.

Johnson vs. Haydel, 278 U. S. 16, 73 L. ed. 155.

Thus, it has been held that the tracks, bridges, roadbed and equipment of a carrier in actual use in interstate commerce have a definite interstate character, protecting the employees while at work thereon.

Industrial Accident Commission of State of California vs. Payne, 259 U. S. 182, 66 L. ed. 888, 890, 891.

Baltimore & O. S. W. R. Co. vs. Burton, 263 U. S. 540, 68 L. ed. 433, 436.

Louisville & N. R. Co. vs. Parker, 242 U. S. 13, 61 L. ed. 119, 120.

The articles handled by Petitioner as customhouse broker are importable goods, moving in foreign commerce. They are moving in that foreign commerce while Petitioner handles them, and they remain protected by the commerce clause of the Constitution until the actual importer commingles the imported merchandise with the property of the state of his residence.

Thurlow vs. Commonwealth of Mass., 46 U. S. 504, 12 L. ed. 256, 288.

Southern Ry. Co. vs. Greenboro Ice & Coal Co., supra.

U. S. vs. Sheffield Farms Co., 43 Fed. Supp. 1.

Petitioner has not claimed, and the District Court of Minnesota did not hold, that Petitioner was or is a "Govern-

ment official" or Government agent, like an Indian agent or the Collector of Customs or the Collector of Internal Revenue. The Petitioner has claimed, and the District Court of Minnesota held, that Petitioner is an adjunct, an instrumentality used and employed by importers and exporters and the United States to protect the importers and the revenue of the United States.

It is unnecessary to prolong the discussion. It seems to us to be "too plain to require discussion that" Petitioner is engaged in foreign commerce.

We therefore respectfully maintain that Petitioner is engaged in "foreign commerce," and that it is therefore protected from oppressive State laws and restrictions. It was entitled to sue in Minnesota without a Certificate of Authority.

2. The Minnesota Foreign Corporation Act Directly Obstructs and Interferes With Commerce and Cannot Be Used to Prevent the Petitioner From Maintaining Its Suit in That State.

The pertinent sections of the Minnesota Foreign Corporation Act (Ch. 200, Laws of Minnesota, 1935) are printed as Appendix I and are Secs. 2, 5, 6, 9, 10, 20, 21, with their respective subdivisions. This law provides, as will be seen, that:

> "No foreign corporation transacting business in this state (Minnesota) without a certificate of authority shall be permitted to maintain an action in any court in this state until such corporation shall have obtained a certificate of authority."

This statute further provides that:

> "No foreign corporation shall transact business in this state unless it holds a certificate of authority so to do."

To get such a Certificate of Authority $50.00 must be paid with the application as an initial filing fee.

If a foreign corporation does transact business in Minnesota without a Certificate of Authority this law subjects it to a penalty of not exceeding $1,000.00 and an additional penalty of not more than $100.00 "for each month or fraction thereof during which it shall continue to transact business in this state without a Certificate of Authority thereafter." This is a very serious burden.

There are a great many other burdensome provisions in this statute affecting the business done by a foreign corporation in Minnesota.

The present Minnesota Foreign Corporation Act is, in substance, Sec. 7493, *Mason's Minnesota Statutes, 1927,* which was originally adopted by the Legislature of Minnesota as the Somerville Law," Ch. 69, Laws of Minnesota, 1899. The force and application of this law on foreign corporations engaged in interstate business was decided by the Supreme Court of Minnesota nearly 40 years ago.

In the case of *Rock Island Plow Company vs. Peterson, supra,* decided in 1904, the Supreme Court of Minnesota held that this law did not apply to a foreign corporation engaged in interstate commerce. The Court there said:

> "This statute was not intended to interfere with interstate commerce, for it is beyond the power of the legislature to enact laws prohibiting or restricting parties engaged in that sort of business, but was intended to apply exclusively to foreign corporations doing business within our borders, as distinguished from interstate commerce."

The rule recognized and established in that early case has been followed by the Minnesota Supreme Court in several later cases. Among them are:

Victor Talking Machine Co. vs. Lucker, 128 Minn. 171, 150 N. W. 790.

Thomas Mfg. Co. vs. Knapp, 101 Minn. 432, 112 N. W. 989.

Defender Auto-Lock Co. vs. Schmelzel Co., 157 Minn. 285, 196 N. W. 263.

The present Supreme Court of Minnesota recognizes these former holdings because the Court says:

> "Statutes similar to the one here invoked (Minnesota Foreign Corporation Act) by defendants have usually been held to place an undue burden on interstate commerce and hence to be unconstitutional as to foreign corporations engaged in interstate business.
>
> *Davis vs. Farmers Co-op. Equity Co.*, 262 U. S. 312.
>
> *Sioux Remedy Co. vs. Cope*, 235 U. S. 197 (R. 149 (734))."

Consequently, we say that the Minnesota Foreign Corporation Act was not intended, and cannot be construed, to exclude foreign corporations from the State of Minnesota, or exact conditions for allowing them to sue in the courts of the State where they are engaged in interstate commerce. Petitioner's general and usual course of business was and is interstate or foreign commerce within the purview and protection of clause 3, Sec. 8, Art. I of the Constitution of the United States. The District Court of Minnesota appreciated and recognized this principle of law (see Finding 5, *supra*, and R. 125).

That finding of the District Court is a crystal clear statement of facts. It states the sum total of the facts of Petitioner's business. There is no escape from this judicial finding of fact. It represents the essence of all of the testimony and of all other evidence.

Accordingly, Petitioner had the absolute right to bring this suit in the state court where it was tried without complying with the provisions of the Minnesota Foreign Corpo-

ration Act. A long line of decisions could be cited to support this claim, but the following citations will suffice:

Hooper vs. California, 155 U. S. 652, 39 L. ed. 207.

Western Union Telegraph Co. vs. Texas, 105 U. S. 460, 26 L. ed. 1067.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1, 54 L. ed. 355.

McCall vs. California, 136 U. S. 104, 34 L. ed. 391.

Robbins vs. Shelby Co. Taxing Dist., 120 U. S. 489, 30 L. ed. 694.

Crutcher vs. Commonwealth of Kentucky, 141 U. S. 47, 35 L. ed. 649.

Texas Transport & Terminal Co. vs. New Orleans, 264 U. S. 160, 68 L. ed. 611.

Puget Sound Stevedoring Co. vs. Tax Commission, *supra*.

Dahnke-Walker Mill. Co. vs. Bondurant, *supra*.

Looney vs. Crane Co., 245 U. S. 178, 62 L. ed. 230.

Sioux Remedy Co. vs. Cope, *supra*.

Lawder vs. Stone, 187 U. S. 281, 47 L. ed. 178.

DeLima vs. Bidwell, 182 U. S. 1, 45 L. ed. 1041.

Harriot vs. Brune, 9 How. 619, 13 L. ed. 282.

So. Covington & Co. St. Ry. Co. vs. Covington, 235 U. S. 537, 59 L. ed. 350.

Stafford vs. Wallace, *supra*.

Swift & Co. vs. U. S., *supra*.

Leicy vs. Hardin, 135 U. S. 100, 119, 34 L. ed. 128, 136.

Brown vs. Maryland, 12 Wheat. 419, 6 L. ed. 678, 688.

State of Missouri vs. Kansas Natural Gas Co., 282 Fed. 341, 345.

First vs. Brewster, 282 U. S. 493, 75 L. ed. 478, 481.

Board of Trustees of University of Illinois vs. U. S., *supra*.

The license granted to Petitioner by the Government covers the county in Minnesota where this action was brought and tried to judgment. That county is a part of the district which is covered by the license. The business authorized to be carried on under that license, and it is the only business engaged in by Petitioner, is a part of our foreign commerce.

The decision of the Supreme Court of Minnesota denied the life of the license as to that county by holding that Petitioner cannot sue in that county without a Certificate of Authority pursuant to the provisions of the Minnesota Foreign Corporation Act.

Petitioner respectfully contends that the license granted by the Government supersedes the Minnesota Act, and that, on this ground, as well as on the grounds discussed, the Minnesota Supreme Court committed reversible error in holding that Petitioner cannot sue in that State without a Certificate of Authority. Its license as a customhouse broker is supreme and the Foreign Corporation Act must yield, that its benefit may be fully realized.

CONCLUSION

Petitioner withdraws its claim that the decision of the Supreme Court of Minnesota in this case offends against Art. IV of the Constitution because it is a corporation.

The Federal Government creates and controls Petitioner's business as a customhouse broker for the protection of importers and the revenue of the United States.

Imports arriving at the Port of Entry from Canada are placed in the custody of the United States to insure two things: (a) the rejection of goods not admissible as importations; and (b) to insure the collection of the duty due under the Tariff Act from the remainder, with the least practicable trouble and to insure their speedy delivery to the ultimate consignee.

We are not concerned here with the first of these objects.

With respect to the second class of goods arriving at the Port of Entry, they arrive "consigned" to the broker designated on the bill of lading and invoice. If that designated "person" is licensed as is the Petitioner, then it becomes Petitioner's duty to accept or reject the goods when they arrive. If accepted it is the business of the Petitioner to receive the title to these, subject to the rights of the United States, and to "enter" and "clear them of customs" that the common carrier, transporting them under a through bill of lading, may, at the earliest practicable moment, continue on its journey to deliver them to the actual importer or ultimate consignee from the Port. Petitioner "enters" them and "clears them from customs" by paying the estimated duty, and this it is authorized by the Government to do, either by drawing on the carrier for the amount due, including its fees, or by advancing its own money and thereafter billing its client, or by using the client's money of the kind designated by law as a proper medium for paying the duty, and

by assuming the obligation to pay any additional or increased duty which later may be found due. Its further duty is to compile and maintain records such as the Government demands and prescribes as necessary for the future such as correcting any error in computing the duty called for by the Tariff Act, or called for by any concealment or fraud practiced by the shipper in describing the goods delivered by the carrier for importation into the United States.

Only Petitioner, or its authorized agent, may make that entry. It is primarily liable under its bond for any mistakes that may be made. The Collector is immune from liability.

When these things have been done the shipment may proceed, but only then; and when that happens the goods so cleared are still moving in foreign commerce.

This service aids and fosters foreign commerce, and is an ingenious system established pursuant to authority of Congress to secure the Government against loss of duty or revenue, and to protect the importer.

The legal status of Petitioner as a customhouse broker arises from an Act of Congress. Its business and its dealings with its clients are governed to the minutest detail by that Act of Congress and by the Rules and Regulations Relating to Customhouse Brokers. These Rules are themselves authorized by Congress.

Petitioner's business is exclusively connected with the nation's foreign commerce. Its right to engage in that business depends on its license, for when the license is revoked its right to engage in that business ceases. Without a license it cannot act as a customhouse broker, irregardless of how efficient its individually licensed officers may be.

The District Court of Minnesota found that "customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in fa-

cilitating the free flow of commerce between the United States and the Dominion of Canada."

The Supreme Court of Minnesota held that Petitioner's business was local and intrastate; that it "remotely affects the commerce, if at all" and that without a Certificate of Authority the District Court was without jurisdiction, and that "defendant's motion to dismiss the action at the close of plaintiff's case therefore should have been granted." It therefore reversed the judgment and decision of the trial court.

Gibbons vs. Ogden, 22 U. S. 1, 6 L. ed. 23, is authority for the proposition that "the control of Congress over interstate business is complete"; but it is no authority for a holding that a state may, by oppressive laws and restrictions of its own, burden, interfere with and restrict "commerce."

The following sentences from that decision admit no misunderstanding:

> "The subject to be regulated is commerce; and . . . to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities and do not admit that it comprehends navigation. . . . Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, *and is regulated by prescribing rules for carrying on that intercourse*" (Italics supplied).

That is, Congress directly, and indirectly through the Treasury Department, has prescribed Rules for carrying on commerce between the United States and the Dominion of Canada, and other foreign countries. These Rules, like all Rules, are dead, until someone arrives designated and empowered to execute, to put into use and employ those Rules. Only then do rules become a living, useful force. In the case

at bar, and for the business and interests involved, Congress not only provided Rules for "carrying on" the trade and intercourse between nations, but evolved the means or instrumentalities necessary to make those Rules work. The result was, and is, customhouse brokers, trained by study or experience, or both, to render their specialized service in making those Rules effective for the purposes Congress intended to be realized. This same executed plan, devised to make the Rules effective Regulations of the intercourse between "nations and parts of nations," included the making of the licensed brokers responsible agents for the collecting of the revenue, as well as to provide responsible parties for fostering the "intercourse," or commerce. It would not do, it would not have been feasible or practicable, for obvious reasons, for Congress to provide that the Collectors of Customs should also be charged with the duty of collecting and receiving duty. It would have opened up too many avenues of escape for crafty importers and exporters, and would have invited fraud and trickery. And so the responsibility for estimating and paying the correct amount of duty was imposed on the licensed customhouse broker, in lieu of which he was given the right to charge either the importer or the exporter for his services, depending on who actually designates him as the broker for purposes of clearance at the Port of Entry.

"The mind can scarcely conceive a system for regulating commerce between nations" which detaches from that system those persons who make the regulations of commerce work according to the plans of Congress. If the broker is using and applying the Rules devised by the Government for carrying on intercourse between nations it must follow that he is engaged in that business; and if engaged in that business he is granted the fruits of the business governed by the Rules and by the law which created the Rules. This system of regulating foreign commerce represents the wis-

dom and discretion of Congress, and furnishes the restraint by which abuse of the Regulations is reduced to a minimum. The apparent conflict in the objects attained arises from the fact that here there is an apparent blending of the power to lay and collect taxes (duties on importations) and the power to "regulate commerce." Through the licensed customhouse broker, amply bonded, the two powers of Congress are simultaneously exercised. The licensed customhouse broker is the medium, disconnected so far as Government employment is concerned, for achieving both objects—the protection of importers and the revenue of the United States. The object of the Regulation is to improve the intercourse between nations, and thus to cultivate the income, the revenue, of the United States. This object is realized by the use of the licensed customhouse broker in carrying out the Rules adopted pursuant to Act of Congress for regulating commerce between nations. Remove these, and chaos would follow. They are removed if they are not adjuncts, instruments, employed by the United States to aid the free flow of foreign commerce, because if they do not so serve the Government the means devised by Congress to do so are not responsible to the Treasury Department, and the licenses granted by the Government would be a futile, useless luxury. Why should the Government have reserved to itself the right to revoke the license of a customhouse broker if he be merely engaged in intrastate business, enjoying the privilege of meddling with foreign commerce only for his own profit and selfish purposes? To ask the question is to reduce the claim to an absurdity.

In seeking justification for the holding that a licensed customhouse broker is only an independent contractor, engaged in local and intrastate business, and therefore subject to the Minnesota Foreign Corporation Act, the Supreme Court of Minnesota refers to "the confusion that has resulted in an

attempt to define interstate commerce," and says:

> "Despite this well defined power of Congress over strictly interstate commerce, it cannot be extended so as to include regulatory control over a business which has no substantial relation to such commerce and does not involve a question of national concern. To permit such control would be voluntarily to eliminate the distinction between what is national and what is local and create a completely centralized government. *National L. R. Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1" (R. 150). . . .
>
> "When abuses creep into our national economy or where other problems arise which are of vital public concern and present issues of national public policy, it is natural and *commendable* that the commerce clause should be given a broad interpretation so as to sustain legislation by the Congress having for its *laudable* purpose the elimination of abuses and the solution of these problems" (Italics supplied) (R. 157 (742)). . . .
>
> "It is entirely consistent with these decisions (the citations) and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to *preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our Government during its century and a half of its existence*" (Italics supplied) (R. 157 (742)).

The state's rights doctrine is not involved here. Ever since 1789 Congress has exercised its power to regulate commerce among nations and among the states, and where Congress has acted, as is the case here, its powers are supreme and exclusive.

The error of the Supreme Court of Minnesota appears to spring from the fact that it failed to note that the licensed customhouse broker and his business is under the exclusive and absolute control and regulation, in the conduct of his business, of the Government. This is evident when we consider the Court's analysis of the *Puget Sound Stevedoring*

Company case, supra. The Supreme Court of Minnesota, in an effort to distinguish that case, said:

> "While the case of *Puget Sound Stevedoring Co. vs. State Tax Comm.*, 302 U. S. 90, 58 S. Ct. 72, 82 L. ed. 68, is not squarely in point, we believe that that phase of it having to do with the furnishing of employees to the steamship companies for stevedoring duties where the company did not exercise any control or direction over their duties is more closely analogous. In that case the court (this Honorable Court) determined that where the stevedoring corporation furnished the laborers and retained supervision and control over their activities, where they actually assisted in loading and unloading the articles of commerce, such activity was interstate commerce; but that if these employees had been furnished to the steamship companies without supervision or direction, then there was no direct relation to the commerce and the employer would be but an independent contractor. Similarly, the customhouse broker, in paying the duties, is but an independent contractor under his contractual relationship with the shipper" (R. 134 (739)).

It is respectfully submitted that the Supreme Court of Minnesota overlooked an important part of that decision. The omitted part of the Puget Sound Stevedoring case reads:

> "The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor." (82 L. ed. 72.)

By overlooking this principle in the Puget Sound Stevedoring case the Supreme Court of Minnesota was led to commit error by concluding that an independent contractor cannot have the protection of the commerce clause, and in holding that "similarly, the customhouse broker, in paying the duties, is but an independent contractor under his con-

tractual relationship with the shipper," and to hold by implication that customhouse brokers are furnished to foreign commerce "without supervision or direction" by the licensor, the Government of the United States. This use and construction of the Puget Sound Stevedoring case by the Supreme Court of Minnesota is unwarranted because the Rules and Regulations Relating to Customhouse Brokers and the Act of Congress conclusively prove the contrary. The customhouse broker is designated and licensed by the Government to aid importers and exporters to effectively pursue their business in order that the regulation of commerce with foreign nations, committed by the Constitution to the exclusive control of Congress, may not only be effective, but also helpful to the "intercourse" between "nations and parts of nations." The Federal Government initiates, retains and exercises complete and exclusive control over the customhouse broker and his business. The error of the Supreme Court of Minnesota in its use and application of the Puget Sound Stevedoring Company case is emphasized when we refer to the actual situation and ruling as there stated by this Honorable Court. We quote (pp. 70 and 71):

> "A statute of the state of Washington provides that for the privilege of engaging in business activities within the state a tax shall be payable by persons so engaged, payment to be made according to a designated measure. . . . This general provision is broad enough to cover the business of a stevedore.
>
> Appellant, the Puget Sound Stevedoring Company, is a Washington corporation. It is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. At times it contracts with a shipowner or shipmaster to load or discharge a vessel through its own employees, controlling and directing the work itself. The great mass of its business, as we were informed upon the argument, is done in that way. At times, however, even though comparatively infrequently, it makes a different kind of contract which changes es-

sentially its relation to the ship. In this second form of contract it does not undertake to control, direct or supervise the work. It (the Stevedoring Company) 'merely collects the longshoremen and supplies them to the vessel,' advancing their pay at the completion of the job and 'billing the ship and her owner the amount of the payroll plus a commission for services.' All vessels served by the appellants are engaged in interstate and foreign commerce."

Those served here are all doing foreign commerce.

The Stevedoring Company brought suit to enjoin the enforcement of the tax mentioned. The trial court dismissed the bill. On appeal the Supreme Court of Washington affirmed the decision of the trial court "upon the ground that the taxpayer was an independent contractor engaged in a local business." This decision of the State Court was modified by the Supreme Court of the United States and this Honorable Court held:

"The business of appellant (the Puget Sound Stevedoring Co.), in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; *but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners*' (Italics supplied). (Citations.) No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. (Citations.) The longshoreman busied in the same task bears the same relation to the commerce that he serves. . . .

The business of loading and unloading being inter-

state or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts.

. . . . . .

The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. "An independent contractor undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself." (From pages 70 to 72, 82 L. ed.)

The transportation of the goods from Canada into the United States is foreign commerce. This transportation would be futile for the importation would be impossible without the entry of the goods and their clearance at the Port of Entry. The licensed broker is as "indispensable" to the moving of the goods from the Port of Entry, in the absence of the owner of the goods, as is the carrier and the Collector. "No one would deny" that if the owner of the importations traveled with the carrier and cleared his goods at the Port that he "would be engaged in interstate or foreign commerce. The licensed broker busied in the same task bears the same relation to the commerce he serves." If the broker be an independent contractor, he is still entitled to the protection due to agencies engaged in foreign commerce.

The Minnesota Court's use of the excerpt from the *National Labor Relations Board vs. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. ed. 893, is inapt. In that case, against the attempt of the defendant corporation to have the National Labor Relations Act invalidated, Justice Hughes properly observed:

"That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

No one will question the truth of that self-evident propo-

sition, but that proposition is not at stake here, for the case at bar relates to an exercise of the powers of Congress over commerce.

The Minnesota Court's quotation from *Wickard vs. Filburn*, 63 S. Ct. Rep. 82, is incomplete. The four paragraphs of the opinion in the *Wickard vs. Filburn case, supra*, which precedes the part quoted in the opinion deserve careful attention.

Finally, if it be assumed for the argument that the business of Petitioner is local and intrastate, yet it must be conceded that its conduct and operation of its business affects foreign and interstate commerce; that the Rules provided by Congress and the Treasury for the efficient movement of goods in foreign commerce, and for the protection of the public revenue, control Petitioner in its business. That being true, the power of Congress over foreign commerce protects Petitioner from burdens or restrictions imposed by state legislation because nothing done by the state may injuriously interfere with foreign and interstate commerce. The Supreme Court of Minnesota admits as much. That Court admits that customhouse brokers are required to be licensed ". . . but (it said) the sole purpose of that requirement is *to protect the collection of tariffs due the Federal Government*" (R. 153). (Italics supplied.)

And again it admits:

> "*Its* (Petitioner's) *duty as an agent* of the shipper *was merely to pay the customs duties* and make settlement subsequently with its principal, the shipper" (R. 153). "*He is at most an aid or facility to the commerce* and but remotely, if at all, affects it" (Italics supplied) (R. 153, 154).

The Court fails to note the important fact that the customhouse broker cannot act "to protect the collection of tariffs due the Federal Government unless licensed by the

Government, nor after the license has been revoked; and that when licensed he is furnished 'to aid in foreign commerce.'" However, the acts enumerated by the Court as business activities of the customhouse brokers are sufficiently important to show that their business affects foreign commerce which is under the exclusive control of Congress.

Petitioner, being a foreign corporation, is required by the Minnesota Foreign Corporation Act, *unless it is engaged in interstate commerce* (Italics supplied), to obtain a Certificate of Authority, and failing to do that "it shall forfeit and pay" to Minnesota "a penalty, not exceeding $1,000.00, and an additional penalty, not exceeding $100.00" per month for the time it transacts business without such Certificate of Authority. These penalties are recoverable in an action brought "in the District Court of any county" in which it has done business or in which it has property or a place of business "by an action, in the name of the State, brought by the Attorney General" (Sec. 20 (c), Appendix I, *infra*).

When and if a Certificate of Authority is obtained, it must pay a variety of fees, some of which are unavoidable and some of which are avoidable if its corporate structure remains static (Sec. 21 (a), Appendix I, *infra*). It must maintain, under arduous conditions, an agent on whom service of process may be made.

The action authorized to be maintained for the collection of the mentioned penalties is connected with dire consequences. Not having been authorized to do business in the state it must appear to defend the action in the state from which it is excluded and virtually in the county selected by its accuser. This involves great expense in addition to the penalties. Such an action is probably without a defense. The business it has carried on in good faith becomes destroyed. The judgment obtained in Minnesota is binding on the courts of its true domicile. The dangers from these

provisions, particularly when we take account of a business such as Petitioner's, are many and serious. Petitioner's business is dependent on the flow of foreign commerce and on the ability to secure a bond acceptable to the Collector. To exist and carry on its business Petitioner must follow the flow of commerce. It cannot be denied that at least 95 per cent of its business was taken from Portal in North Dakota to Noyes in Minnesota. Petitioner has no control, either by persuasion or other means, over that changed flow of commerce. It cannot lure it back nor command it to return to Portal, because the shippers are themselves dependent on the common carrier transporting their merchandise from the Dominion of Canada into the United States.

Manifestly, the provisions of the Minnesota Foreign Corporation Act are oppressive, for if they apply they destroy the life and business of the Petitioner.

But since Petitioner's business affects foreign commerce, Petitioner respectfully insists that the Minnesota Foreign Corporation Act is invalid as applied to this business, for without its service, and the service of other customhouse brokers, the Rules and Regulations of foreign commerce would remain so much dead wood.

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.' (Citations.) The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. (Citations.) It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those

intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

. . .

It is no answer to suggest . . . that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce. (Citations.) It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power."

Chief Justice Stone, in *United States vs. Wrightwood Dairy Co.*, 62 S. Ct. 523, 527, 315 U. S. 110.

We conclude that Petitioner is protected by the exercised power of Congress over foreign commerce, and that the Minnesota Act has been illegally employed to strike down the judgment recovered against the Respondents.

The Constitution is the supreme law of the land. The judges in every state are bound by this supreme law "anything in the Constitution or laws of any state to the contrary notwithstanding". (Art VI, 2, 3 and Preamble).

The powers delegated to Congress, "save as excepted by the silence of the Constitution, or by positive limitation, are universal and affirmative. The Constitution provides only for judicial interpretation." The use of the powers conferred by the Constitution is indicated by Congressional legislation, and when the Supreme Court of the United States has pronounced Congressional legislation constitutional the legislation and the decision represent the supreme law of the land until such time as the Congress may constitutionally legislate a change. The decisions of the Supreme Court are not rendered to approve a sudden urge of Congress to eliminate some abuse developed in an industry, or "to sustain legislation by the Congress having for its laudable purpose

the elimination of abuses and the solution of these problems," nor to support or to oppose conflicting political claims concerning state's rights. No such consideration can affect or modify the constitutional rights of Petitioner, and the decisions of this Honorable Court may not be reconstructed or interpreted by an inferior court on any such premise. It is the duty of all citizens, and of all inferior courts as well, to apply the rules of law laid down by this Honorable Court in its interpretation of the Constitution applied to Congressional legislation.

The decision of the Supreme Court of Minnesota is invalid, and the judgment of the District Court of Minnesota should be reaffirmed and reinstated.

Dated December 31, 1943.

Respectfully submitted,

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APPENDIX

I.

CHAPTER 200, H. F. No. 818; Laws of Minnesota, 1935:

(Minnesota Foreign Corporation Act, Chapter 303; *Minnesota Statutes, 1941,* Vol. I, pp. 2260 to 2272; 7495-1 to 7495-30, *Mason's Minn. Statutes, 1927,* Vol. III, 1938 Supp.)

The material and relevant sections of the Minnesota Foreign Corporation Act involved herein read:

"CHAPTER 200, H. F. No. 818.

An Act relating to foreign corporations; providing for their admission to transact business in this State; for their withdrawal from this State; for the revocation of their authority to transact business in this State; for payment by them of certain license fees; for filing by them of annual reports; for the appointment by them of resident agents for service of process; for service of process on foreign corporations; for penalties and liabilities for violations of this Act; for the filing and recording of certificates of authority issued pursuant to this Act, and their effect as evidence; for the payment by foreign corporations of certain fees to the secretary of state and to registers of deeds; for the application of this Act to foreign corporations heretofore authorized to transact business in this State; for the repeal of *Mason's Minnesota Statutes of 1927,* Sections 7493, 7494 and 7495; and for an appropriation for administering this Act.

Be it enacted by the Legislature of the State of Minnesota:

. . . . . .

Sec. 2. Foreign corporations must have certificate of authority.—No foreign corporation shall transact business in this state unless it holds a certificate of authority so to do; and no foreign corporation whose certificate of authority shall have been revoked or cancelled pursuant to the provisions of this act shall be entitled to obtain a certificate of authority except in accordance

with the provisions of Section 19 of this Act. (Sec. 303.03, *Minn. Stat. 1941,* Vol. I.)

. . . . . .

Sec. 5. Requisites for certificates.—(a) In order to procure a certificate of authority to transact business in this state, a foreign corporation shall make application therefor to the secretary of state which application shall set forth:

(1) The name of the corporation and the state or country under the laws of which it is organized;

(2) If the name of the corporation does not end with the word "Corporation", or the word "Incorporated" or the abbreviation "Inc.", or does not contain the word "Company" or the abbreviation "Co." not immediately preceded by the word "and" or the character "&", then the name of the corporation with the word or abbreviation which it agrees to add thereto for use in this State;

(3) The date of its incorporation and the period of its duration;

(4) The address of its principal office in the state or country under the laws of which it is organized;

(5) The address of its proposed registered office in this state and the name of its proposed registered agent in this state;

(6) That it irrevocably consents to the service of process upon it as set forth in section 13, of this act, or any amendment thereto;

(7) The names and respective addresses of its directors and officers;

(8) A statement of the aggregate number of shares having par value and of shares without par value which it shall have authority to issue, itemized by classes and series;

(9) A statement of the aggregate number of its issued or allotted shares having par value and of shares without par value, itemized by classes and series; and

(10) A statement that the officers executing the appli-

cation have been duly authorized so to do by the board of directors of the corporation.

(b) Such application shall be made on forms prescribed and furnished by the secretary of state, and shall be executed, acknowledged and verified by its president or a vice president, and by its secretary or an assistant secretary, and delivered to the secretary of state with authenticated copies of its articles of incorporation.

Sec. 6. Initial license fee to be $50.—At the time of making application for a certificate of authority the foreign corporation making such application shall pay to the state treasurer the sum of $50.00 as an initial license fee. (Sec. 303.07, *Minn. Stat. 1941*, Vol. I.)

. . . . .

Sec. 9. Must have office and agent.—Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

(a) A registered office which shall be in a county where it has its principal place of business in this state, or if it has no place of business in this state then in any county where it does or proposes to do business;

(b) A registered agent, which agent may be either an individual, resident in this state, whose business office is identical with such registered office, or a corporation having a business office identical with such registered office.

Sec. 10. Powers and duties.—A foreign corporation may from time to time change the location and address of its registered office. It may revoke the appointment of a registered agent provided it shall at the same time file an appointment of a new registered agent. It shall appoint a new registered agent in case of vacancy in the office, whether by death, resignation or otherwise, or because of the disqualification or incapacity of its registered agent. Such changes may be made by filing in the office of the secretary of state a statement setting forth:

(a) The name of the corporation;

(b) The address of its registered office;

(c) If the address of its registered office is to be

changed, the address to which the registered office is to be changed;

(d) The name of its then registered agent;

(e) If its registered agent is to be changed, the name of its successor registered agent; and

(f) That such change was authorized by resolution duly adopted by its board of directors.

Such statement shall be executed, acknowledged and verified by its president or a vice-president, and by its secretary or an assistant secretary. (Sec. 303.10, *Minn. Stat. 1941*, Vol. I.)

. . . . . .

Sec. 20. Foreign corporation may not maintain action unless licensed.— (a) No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action in any court of (in) this state until such corporation shall have obtained a certificate of authority. Nor shall an action be maintained in any court by any successor or assignee of such corporation on any right, claim, or demand arising out of the transaction of business by such corporation in this state until a certificate of authority to transact business in this state shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets; provided that if such assignee shall be a purchaser without actual notice of such violation by the corporation, recovery may be had to an amount not greater than the purchase price; and provided further that this section shall not be construed to alter the rules applicable to a holder in due course of a negotiable instrument.

(b) The failure of a foreign corporation to obtain a certificate of authority to transact business in this state does not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action in any court of this state.

(c) Any foreign corporation which transacts business in this state without a certificate of authority shall forfeit and pay to this state a penalty not exceeding

$1,000.00 and an additional penalty not exceeding $100.00 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority therefor. Such penalties may be recovered in the district court of any county in which such foreign corporation has done business or has property or has a place of business, by an action in the name of the state brought by the attorney general. (Sec. 303.20, *Minn. Stat. 1941*, Vol. I.)

Sec. 21. Fees.— (a) The secretary of state shall charge and receive the following fees for the following services:

(1) For filing an application for a certificate of authority, five dollars;

(2) For filing an annual report, five dollars;

(3) For filing articles of amendment or an instrument evidencing a reduction of stated capital, or a merger or consolidation, two dollars;

(4) For filing application for withdrawal and final report, five dollars;

(5) For filing a change of address of registered office or revocation or change of appointment of a registered agent, one dollar;

(6) For filing an application for reinstatement of a certificate of authority, five dollars;

(7) For issuing any certificate pursuant to the provisions of this act, two dollars;

(b) In addition thereto, in each instance in which he is required by this act to transmit a certificate to a register of deeds for record, the secretary of state shall charge and receive one dollar for recording such certificate with the register of deeds. (Sec. 303.21, *Minn. Stat. 1941*, Vol. I.)

. . . . . .

Sec. 25. Minnesota Foreign Corporation Act.—This act may be cited as the Minnesota Foreign Corporation Act. (Sec. 303.01, *Minn. Stat. 1941*, Vol. I.)

. . . . . .

II.

There is involved the construction and validity of "Rules and Regulations Relating to Customhouse Brokers" issued by the United States Treasury Department, Office of the Secretary, Washington, April 16, 1936, Department Circular No. 559, (Filed with the Division of the Federal Register, April 20, 1936, 9:48 a. m.) as amended. Exh. "A."

The parts of said Rules and Regulations here material provide:

> "By virtue of and pursuant to the authority vested in me, including the authority conferred by section 641 of the Tariff Act of 1930, as amended, the following regulations are hereby promulgated:
>
> Sec. 1. Licenses for Brokers Required—Qualifications—Regulations Authorized—(a) Tariff Act of 1930, Section 641 (a), as amended:
>
> . . . . . Except as provided in subdivision (c) of this section, no person shall transact business as a customhouse broker without a license granted in accordance with the provisions of this subdivision, but nothing in this section shall be construed to authorize the requiring of a license in the case of any person transacting at a customhouse business pertaining to his own importations. (Aug. 26, 1935, Ch. 689, sec. 3, 49 Stat. 864) (19 U. S. C. A. Sec. 1641 (a).)
>
> (b) No representative of the Treasury Department shall recognize or deal with any person transacting the business of a customhouse broker, or any employee, officer, or agent thereof, unless such person is licensed as a customhouse broker in accordance with the provisions of these regulations.
>
> (c) Tariff Act of 1930, section 641 (a); (19 U. S. C. A. Sec. 1641 (a)): The Secretary of the Treasury may prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations, associations, and partnerships, and may require as a condition

to the granting of any license, the showing of such facts as he may deem advisable as to the qualifications of the applicant to render valuable service to importers and exporters. No such license shall be granted to any corporation, association or partnership unless licenses as customhouse brokers have been issued to at least two of the officers of such corporation or association, or two of the members of such partnership, and such licenses are in force. . . . .

(d) Tariff Act of 1930, section 641 (d), 19 U. S. C. A. Sec. 1641 (d), as amended:

The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section. . . . . (Aug. 26, 1935, Ch. 689, sec. 4, 49 Stat. 865.)

Sec. 2. DEFINITIONS—When used in these regulations—

(a) Customhouse Broker.—The term "customhouse broker" includes any person who, acting on behalf of others, transacts customs business not limited to a kind described in section 7 of these regulations.

(b) TREASURY DEPARTMENT OR ANY REPRESENTATIVE THEREOF.—The term "Treasury Department or any representative thereof" includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office or unit. . . . . .

(d) PERSON.—The word "person" includes corporations, associations, and partnerships.

(e) BOOKS AND PAPERS.—The term "books and papers" includes all books, accounts, records, papers, documents, and correspondence of a customhouse broker relating to his customs business.

Sec. 3. APPLICATION FOR LICENSE AND INVESTIGATION OF APPLICATION.—(a) A person desiring to engage in the business of a customhouse broker shall submit an application to the Committee, stating his qualifications for a license. The application shall be under oath and in such

standard form as the Committee, with the approval of the Secretary, shall have prescribed. . . . . .

(d) . . . . . In the case of a corporation, association, or partnership, the application will be rejected by the Committee unless it appears that the officers or members who are licensed customhouse brokers are to exercise responsible supervision and control of the transaction of the customs business of such corporation, association, or partnership. An individual who is unable for any reason to take the oath of allegiance and to support the Constitution of the United States shall not be licensed. . . . .

Sec. 4. ISSUANCE OR DENIAL OF LICENSE.—(a) If the Committee finds that the applicant is qualified, the Committee will issue a license in such standard form as the Committee, with the approval of the Secretary of the Treasury, shall have prescribed. The license shall be forwarded to the appropriate collector of customs, who shall deliver it to the licensee after making a record thereof in a roster of licensed brokers which shall be maintained in the customhouse in such manner that it will be readily accessible to the proper customs officers and employees. . . . . .

Sec. 8. BOOKS AND PAPERS.—(a) Tariff Act of 1930, section 641 (d), as amended:

The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section, including rules and regulations requiring the keeping of books, accounts, and records by customhouse brokers, and the inspection thereof, and of their papers, documents, and correspondence by, and the furnishing by them of information relating to their business to, any duly accredited agent of the United States. (Aug. 26, 1935, Ch. 689, sec. 4, 49 Stat. 865.)

(b) Each licensed customhouse broker shall maintain correctly and in orderly itemized manner, and keep current, records of account reflecting all his financial transactions as a customhouse broker. He shall keep

and maintain on file a copy of each entry made by him, and copies of all his correspondence and other papers relating to his customs business.

(g) All of the books and papers required by the foregoing provisions of this section shall be kept on file for at least five years and maintained in such manner that they may readily be examined. Any or all of such books and papers shall be made available to duly accredited agents of the United States on demand therefor within five years after their preparation or receipt by the broker, or within such longer period of time during which they remain in the possession of the broker. The broker shall also furnish such additional information regarding his activities as a licensed customhouse broker as such agents may require.

Sec. 9. OTHER DUTIES AND OBLIGATIONS OF LICENSED CUSTOMHOUSE BROKERS.—(a) The duties and obligations specified in this section and elsewhere in these regulations relating to customhouse brokers are not to be construed as exclusive, since the Secretary of the Treasury may deem conduct not within the purview of any specification in these regulations to be such as would also warrant the suspension or revocation of a license under the authority conferred upon him by section 641 of the Tariff Act of 1930, as amended.

(b) No licensed customhouse broker shall permit his license or his name to be used by or for any unlicensed person, or by or for any broker whose license is under suspension, in the solicitation, promotion, or performance of any customs business or transaction.

(c) No licensed customhouse broker shall accept or retain employment from or with an unlicensed employer to transact customs business for others than the employer in such manner that the fees or other benefits resulting from the services rendered by the licensed broker for others inure to the benefit of the unlicensed employer.

(i) No licensed customhouse broker shall suggest to a client or a prospective client a plan known to be illegal

for evading payment of any duty, tax, or other debt or obligation owing to the Government. . . . .

(m) Each licensed customhouse broker shall promptly pay over to the Government when due all sums received for the payment of any duty, tax, or other debt or obligation owing to the Government, and shall promptly account to clients for funds received for them from the Government, or received from a client in excess of the governmental or other charges properly payable in respect of the client's customs business. . . . . .

(q) Each licensed customhouse broker shall exercise due diligence in answering correspondence, in making financial settlements, and in preparing, or assisting in the preparation of, and filing documents, affidavits, and other papers relating to any matter handled by him as a customhouse broker. . . . . .

Sec. 11. CANCELLATION OF LICENSES.—(a) Tariff Act of 1930, section 641 (a): . . . . . Any license granted to any such corporation, association, or partnership shall be deemed revoked if for any continuous period of more than sixty days after the issuance of such license there are not at least two officers of such corporation or association or two members of such partnership who are qualified to transact business as customhouse brokers. . . . . .

(c) A customhouse broker's license may be cancelled upon written application to the Committee and surrender of the license certificate, but before granting the request, inquiry shall be made by the Committee to ascertain whether it has been made in order to evade proceedings for revocation or suspension of the license, in which event the request shall be denied, unless the Secretary of the Treasury shall otherwise order.

III.

The Code of the Laws of the United States of America

Title 19.

Customs Duties

Section 1. Organization of customs service

Except as hereinafter provided the reorganization of the customs service made by the President and communicated to Congress under date of March 3, 1913, shall, until otherwise provided by Congress, constitute the permanent organization of the customs service. (Aug. 24, 1912, c. 355, Par. 1, 37 Stat. 434.)

Section 2. Rearrangement and limitation of districts; changing locations

The President is authorized from time to time, as the exigencies of the service may require, to rearrange, by consolidation or otherwise, the several customs-collection districts and to discontinue ports of entry by abolishing the same or establishing others in their stead;

Provided, That the whole number of customs-collection districts, ports of entry, or either of them, shall at no time be made to exceed those established and authorized as on August 1, 1914, except as the same may thereafter be provided by law. The collector of customs of each customs-collection district shall be officially designated by the number of the district for which he is appointed and not by the name of the port where the headquarters are situated and the President is authorized from time to time to change the location of the

headquarters in any customs-collection district as the needs of the service may require. (Aug. 1, 1914, c. 223, Par. 1, 38 Stat. 623; May 29, 1928, c. 901, Par. 1 (19), 45 Stat. 987.)

. . . . .

Sec. 197. Duties, how payable

Except as provided in the following section all duties upon imports shall be collected in ready money, and shall be paid in gold and silver coin, coin certificates, demand Treasury notes, issued under the authority of the Acts of July 17, 1861, chapter 5, and February 12, 1862, chapter 20, and such other certificates or Treasury notes as may by law be declared receivable in payment thereof. (R. S. Pars. 3009, 3473; Feb. 27, 1877, c. 69, Par. 1, 19 Stat. 247, 249.)

. . . . .

Sec. 232. Definition of "port"

The word "port", as used in this title, may include any place from which merchandise can be shipped for importation, or at which merchandise can be imported. (R. S. Par. 2767.)

. . . . . .

Sec. 1481. Invoice; contents—In general

(a) All invoices of merchandise to be imported into the United States shall set forth—

(1) The port of entry to which the merchandise is destined;

(2) The time when, the place where, and the person by whom and the person to whom the merchandise is sold or agreed to be sold, or if it be imported otherwise than in pursuance of a purchase, the place from which shipped, the time when and the person to whom and the person by whom it is shipped;

(3) A detailed description of the merchandise, including

the name by which each item is known, the grade or quality, and the marks, numbers, or symbols under which sold by the seller or manufacturer to the trade in the country of exportation, together with the marks and numbers of the packages in which the merchandise is packed;

(4) The quantities in the weights and measures of the country or place from which the merchandise is shipped, or in the weights and measures of the United States;

(5) The purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of a purchase or an agreement to purchase;

(6) If the merchandise is shipped otherwise than in pursuance of a purchase or an agreement to purchase, the value for each item, in the currency in which the transactions are usually made, or, in the absence of such value, the price in such currency that the manufacturer, seller, shipper, or owner would have received, or was willing to receive, for such merchandise if sold in the ordinary course of trade and in the usual wholesale quantities in the country of exportation;

(7) The kind of currency, whether gold, silver, or paper;

(8) All charges upon the merchandise, itemized by name and amount when known to the seller or shipper; or all charges by name (including commissions, insurance, freight, cases, containers, coverings, and cost of packing) included in the invoice prices when the amounts for such charges are unknown to the seller or shipper;

(9) All rebates, drawbacks, and bounties, separately itemized, allowed upon the exportation of the merchandise; and

(10) Any other facts deemed necessary to a proper appraisement, examination, and classification, of the merchan-

dise that the Secretary of the Treasury may require.

Shipments not purchased and not shipped by manufacturer

(b) If the merchandise is shipped to a person in the United States by a person other than the manufacturer, otherwise than by purchase, such person shall state on the invoice the time when, the place where, the person from whom such merchandise was purchased, and the price paid therefor in the currency of the purchase, stating whether gold, silver, or paper.

Purchases in different consular districts

(c) When the merchandise has been purchased in different consular districts for shipment to the United States and is assembled for shipment and embraced in a single invoice which is produced for certification under the provisions of paragraph (2) of subdivision (a) of section 1482 of this chapter, the invoice shall have attached thereto the original bills or invoices received by the shipper, or extracts therefrom, showing the actual prices paid or to be paid for such merchandise. The consular officer to whom the invoice is so produced for certification may require that any such original bill or invoice be certified by the consular officer for the district in which the merchandise was purchased.

Exceptions by regulations

(d) The Secretary of the Treasury may by regulations provide for such exceptions from the requirements of this section as he deems advisable. (June 17, 1930, c. 497, Title IV, Par. 481, 46 Stat. 719.)

Sec. 1482. Certified Invoice—Certification in general

(a) Every invoice covering merchandise exceeding $100 in value shall, at or before the time of the shipment of the merchandise, or as soon thereafter as the conditions will permit, be produced for certification to the consular officer of the United States—

(1) For the consular district in which the merchandise was manufactured, or purchased, or from which it was to be delivered pursuant to contract;

(2) For the consular district in which the merchandise is assembled and repacked for shipment to the United States, if it has been purchased in different consular districts.

Declaration

(b) Such invoices shall have indorsed thereon, when so produced, a verified declaration, in a form prescribed by the Secretary of the Treasury, stating whether the merchandise is sold or agreed to be sold, or whether it is shipped otherwise than in pursuance of a purchase or an agreement to purchase, that there is no other invoice differing from the invoice so produced, and that all the statements contained in such invoice and in such declaration are true and correct.

Making and signing

(c) Every certified invoice shall be made out in triplicate, or, for merchandise intended for immediate transportation under the provisions of section 1552 of this chapter, in quadruplicate, if desired by the shipper, and shall be signed by the seller or shipper, or the agent of either; but a person who has no interest in the merchandise except as broker or forwarder shall not be competent to sign any such invoice. Where any such invoice is signed by an agent, he shall state thereon the name of his principal.

Certified under existing law

(d) Such invoices shall be certified in accordance with the provisions of existing law.

Disposition

(e) The original of the invoice and, if made, the quadruplicate shall be delivered to the exporter, to be forwarded to the consignee for use in making entry of the merchandise, and the triplicate shall be promptly transmitted by the consular officer to the collector of customs at the port of entry named in the invoice. The duplicate shall be filed in the office of the consular officer by whom the invoice was certified, to be there kept until the Secretary of State authorizes its destruction.

Certification by others than American consul

(f) When merchandise is to be shipped from a place so remote from an American consulate as to render impracticable certification of the invoice by an American consular officer, such invoice may be certified by a consular officer of a nation at the time in amity with the United States, or if there be no such consular officer available such invoice shall be executed before a notary public or other officer having authority to administer oaths and having an official seal:

Provided, That invoices for merchandise shipped to the United States from the Philippine Islands, the Virgin Islands, American Samoa, the island of Guam, or the Canal Zone may be certified by the collector of customs or the person acting as such, or by his deputy.

Effective date

(g) This section shall take effect August 16, 1930. (June 17, 1930, c. 497, Title IV, Par. 482, 46 Stat. 720.)

Sec. 1483. Consignee as owner of merchandise

For the purposes of this subtitle—

(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along a coast of the United States may be regarded as the consignees.

(2) A person making entry of merchandise under the provisions of subdivision (h) or (i) of section 1484 (relating to entry on carrier's certificate and on duplicate bill of lading, respectively) shall be deemed the sole consignee thereof. (June 17, 1930, c. 497, Title IV, Par. 483, 46 Stat. 721.)

Sec. 1484. Entry of merchandise—Requirement and time

(a) Except as provided in sections 1490, 1498, 1552, and 1553 and in subdivision (j) of section 1336 of this chapter, and in subdivisions (h) and (i) of this section, the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within forty-eight hours, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time.

Production of certified invoice

(b) No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor, except that entry may be permitted if—

(1) The collector is satisfied that the failure to produce such invoice is due to causes beyond the control of the person making entry;

(2) Such person makes a verified declaration in writing that he is unable to produce such invoice and (A) files therewith a seller's or shipper's invoice, or (B) if he is not in possession of a seller's or shipper's invoice files therewith a statement of the value, or the price paid, in the form of an invoice; and

(3) Such person gives a bond for the production of such certified invoice within six months.

The Secretary of the Treasury may by regulations provide for such exceptions from the requirements of this subdivision as he deems advisable.

Production of bill of lading

(c) The consignee shall produce the bill of lading at the time of making entry, except that—

(1) If the collector is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to the collector may be accepted in lieu thereof;

(2) The collector is authorized to permit entry and to release merchandise from customs custody without the production of the bill of lading if the person making such entry gives a bond satisfactory to the collector, in a sum equal to not less than one and one-half times the invoice value of the merchandise, to produce such bill of lading, to relieve the

collector of all liability, to indemnify the collector against loss, to defend every action brought upon a claim for loss or damage, by reason of such release from customs custody or a failure to produce such bill of lading and to entitle any person injured by reason of such release from customs custody to sue on such bond in his own name, without making the collector a party thereto. Any person so injured by such release may sue on such bond to recover any damages so sustained by him; and

(3) The provisions of this subdivision shall not apply in the case of an entry under subdivision (h) or (i) of this section (relating to entry on carrier's certificate and on duplicate bill of lading, respectively).

Signing and contents

(d) Such entry shall be signed by the consignee, or his agent, and shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, appraisement, and liquidation, and shall be accompanied by such invoices, bills of lading, certificates, and documents as are required by law and regulations promulgated thereunder.

. . . . .

Entry on carrier's certificate

(h) Any person certified by the carrier bringing the merchandise to the port at which entry is to be made to be the owner or consignee of the merchandise, or an agent of such owner or consignee, may make entry thereof, either in person or by an authorized agent, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483.

Entry on duplicate bill of lading

(i) Any person may, upon the production of a duplicate bill of lading signed or certified to be genuine by the carrier bringing the merchandise to the port at which entry is to be made, make entry for the merchandise in respect of which such bill of lading is issued, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483, except that such person shall make such entry in his own name.

Sec. 1485. Declaration—Requirement; form and contents.

(a) Every consignee making an entry under the provisions of section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true; in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief;

(3) That all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct; and

(4) That he will produce at once to the collector any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct.

. . . . .

Liability of consignee for increased duties

(d) A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

. . . . .

Sec. 1490. General orders—Incomplete entry

(a) Whenever entry of any imported merchandise is not made within the time provided by law or the regulations prescribed by the Secretary of the Treasury, or whenever entry of such merchandise is incomplete because of failure to pay the estimated duties, or whenever, in the opinion of the collector, entry of such merchandise can not be made for want of proper documents or other cause, or whenever the collector believes that any merchandise is not correctly and legally invoiced, he shall take the merchandise into his custody and send it to a bonded warehouse or public store, to be held at the risk and expense of the consignee until entry is made or completed and the proper documents are produced, or a bond given for their production.

. . . . .

Sec. 1505. Payment of duties

The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain,

fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation. (June 17, 1930, c. 497, Title IV, Par. 505, 46 Stat. 732.)

. . . . .

Sec. 1513. Collector's immunity

No collector or other customs officer shall be in any way liable to any owner, importer, consignee, or agent or any other person for or on account of any rulings or decisions as to the appraisement or the classification of any imported merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent might under this chapter be entitled to protest or appeal from the decision of such collector or other officer. (June 17, 1930, c. 497, Title IV, Par. 513, 46 Stat. 734.)

. . . . .

Sec. 1641. Customhouse brokers—Regulations for licensing.

(a) The Secretary of the Treasury may prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations, associations, and partnerships, and may require as a condition to the granting of any license, the showing of such facts as he may deem advisable as to the qualifications of the applicant to render valuable service to importers and exporters. No such license shall be granted to any corporation, association, or partnership unless licenses as customhouse brokers have been issued to at least two of the officers of such corporation or association.

or two of the members of such partnership, and such licenses are in force. Any license granted to any such corporation, association, or partnership shall be deemed revoked if for any continuous period of more than sixty days after the issuance of such license there are not at least two officers of such corporation or association or two members of such partnership who are qualified to transact business as customhouse brokers. Except as provided in subdivision (e) of this section, no person shall transact business as a customhouse broker without a license granted in accordance with the provisions of this subdivision, but nothing in this section shall be construed to authorize the requiring of a license in the case of any person transacting at a customhouse business pertaining to his own importations.

Revocation or suspension; appeal

(b) The collector or chief officer of the customs may at any time, for good and sufficient reasons, serve notice in writing upon any customhouse broker so licensed to show cause why said license shall not be revoked or suspended, which notice shall be in the form of a statement specifically setting forth the ground of complaint. The collector or chief officer of customs shall within ten days thereafter notify the customhouse broker in writing of a hearing to be held before him within five days upon said charges. At such hearing the customhouse broker may be represented by counsel, and all proceedings including the proof of the charges and the answer thereto, shall be presented, with the right of cross-examination to both parties, and a stenographic record of the same shall be made and a copy thereof shall be delivered to the customhouse broker. At the conclusion of such hearing the collector or chief officer of customs shall forthwith transmit all papers and the stenographic report of the hearing, which shall constitute the record in the case,

to the Secretary of the Treasury for his action. Thereupon the said Secretary of the Treasury shall have the right to revoke or suspend the license of any customhouse broker shown to be incompetent, disreputable, or who has refused to comply with the rules and regulations issued under this section, or who has, with intent to defraud, in any manner willfully and knowingly deceived, misled, or threatened any importer, exporter, claimant, or client, or prospective importer, exporter, claimant, or client, by word, circular, letter or by advertisement. . . . . .

Prior licenses

(c) Licenses issued under section 415 of Title 19 (Repealed) or under the provisions of subdivision (a) of this section prior to August 26, 1935, shall continue in force and effect, subject to suspension and revocation as provided in subdivision (b) of this section.

Regulations by Secretary

(d) The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section, including rules and regulations requiring the keeping of books, accounts, and records by customhouse brokers, and the inspection thereof, and of their papers, documents, and correspondence by, and the furnishing by them of information relating to their business to, any duly accredited agent of the United States. (June 17, 1930, c. 497, Title IV, Par. 641, 46 Stat. 759; Aug. 26, 1935, c. 689, Pars. 3-5, 49 Stat. 864, 865.)

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In the
Supreme Court of the United States

OCTOBER TERM, 1943

NO. 291

UNION BROKERAGE COMPANY, a Corporation,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND PETITIONERS SUPPORTING BRIEF

Respondents submit their brief in opposition to the petition for Writ of Certiorari predicated upon the grounds and reasons hereinafter set forth.

I.

ONLY QUESTION PRESENTED

The petitioner, Union Brokerage Company, in its petition for Writ of Certiorari sets forth seven different questions for the court's consideration in its application for a writ to review the decision of the Supreme Court of the State of Minnesota (p. 203).

The decision of the Minnesota Supreme Court is predicated only upon one ground and that is that the petitioner, Union Brokerage Company, a North Dakota corporation which operated and maintained in the State of Minnesota and established business and office at Noyes, Minnesota, did not qualify under the Minnesota Foreign Corporation Statutes. The Minnesota Supreme Court in its decision only decided and determined the question as to whether or not the petitioner, in order to maintain the above captioned action, was required to first obtain a certificate to do business in Minnesota in order to enable it to maintain an action in the Minnesota State Courts.

The sole and ultimate question in this case which petitioner seeks to review is aptly stated by Justice Youngdahl when he summarized the only and ultimate question for review in the language following:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce." (9 N. W. (2d) p. 727) (R. p. 737).

It is conceded that if petitioner was engaged substantially in interstate commerce, the petitioner need not qualify under the Minnesota Foreign Corporation Act. The Minnesota Supreme Court decision, which is incorporated in full in the record, held adversely to petitioner.

It is therefore submitted to this Honorable Court that there is only one question presented and not seven as represented by petitioner.

II.

ADDITIONS AND CORRECTIONS TO PETITIONER'S SUMMARY STATEMENT OF THE MATTER INVOLVE INCLUDING FACT SUMMARY

The petition for the writ under heading No. II gives a summary statement of the matter involved and incorporates therein the subheading, "Factual Background of This Action" (p. 8).

Respondents deem it necessary to supplement and correct the factual background as represented by petitioner so that this Honorable Court may be properly advised as to the factual background in this case.

On September 6, 1938, when respondent Jensen sold his brokerage business at Portal to petitioner, said Jensen also had a customhouse brokerage office and business at Northgate, North Dakota, about 13 miles easterly of Portal. The petitioner, Union Brokerage Company, purchased only the Portal, North Dakota, business, and permitted Jensen to operate his customhouse brokerage business at Northgate, North Dakota (District Court Findings, R. p. 704, ff. 1 and 2).

The State District Court found that the rerouting of shipments by the Canadian Pacific Railway (hereinafter referred to as C. P. R.) through Noyes, Minnesota, rather than Portal, North Dakota, would affect 90 to 95 per cent of the brokerage business at Portal, or in other words there was a loss of foreign shipments at Portal of 90 to 95 per cent by virtue of such change (Findings 21, R., p. 708, ff. 1 and 2). Petitioner states that such rerouting affected or caused a change of 95 or more per cent by virtue of its rerouting (p. 8).

Petitioner was incorporated in 1928 and up to December 5, 1940, maintained only one place of business and

office and that was at Portal, North Dakota. Pursuant to corporate action (Exhibit 4, R., pp. 535, 536) petitioner authorized the establishment of an office at Noyes, Minnesota, three hundred miles easterly of Portal, North Dakota. The rerouting of the C. P. R. took effect July 1, 1940. Respondent Jensen opened an office at Noyes, Minnesota, three hundred miles away from Portal, North Dakota, on or about July 1, 1940. The petitioner did establish and operate a customhouse brokerage business at Noyes, Minnesota, from and after December 5, 1940, in competition with Respondent Jensen.

The Minnesota Supreme Court in its decision has defined the duties of customhouse broker thus:

> "Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regulations of customs law, as well as sufficient information to enable the broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused" (R. p. 729) 9 N. W. (2d) 722, 723.

Respondent Jensen resigned as an officer and employee of petitioner at the request of petitioner on November 5, 1940 (R. p. 359, f. 2).

Prior to the time that petitioner opened its office at Noyes, Minnesota, in competition with respondent Jensen, the petitioner was not authorized to act as a customhouse broker at Noyes, Minnesota, as it had failed to qualify to act as such under the regulations of the Treasury Department, and, further had not procured from the State of Minnesota the required certificate to do business in Minnesota.

Article 1410, Customs Regulations of 1937, provides:

> "However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated, and is prepared and qualified to render efficient service in such other district.**" (Emphasis supplied.)

The petitioner, Union Brokerage Company, until such times as it furnished bonds and qualified as a broker at Noyes, Minnesota, could not and did not transact business as a customhouse broker at Noyes, Minnesota. Certain shipments were sent through Noyes designating the petitioner as the customhouse broker. Claude Phillips, the chief clerk for the Soo Line and the Great Northern Railways at Noyes, testified in substance that such shipments, designating petitioner as customhouse broker, were refused until the shipper designated a qualified customs house broker at Noyes. Petitioner's own witness, Claude Phillips, a former customhouse official, testified clearly as to the handling of such shipments at

Noyes, Minnesota. The pertinent testimony of Mr. Phillips is found on R., p. 415, f. 3; p. 416, ff. 1, 2, as follows:

> "Q. Did you not tell the court, in substance, that if a bill of lading came with a broker designated on it like, we'll say, the Union Brokerage Company, and that broker was not there to receive it to handle it, before a change could be made the originating railroad would have to furnish a so-called carrier's certificate?
>
> A. Yes.
>
> Q. And the originating railroad in order to acquire the authority to furnish that certificate would have to communicate with the shipper and have the shipper make the designation?
>
> A. That's the way they did it.
>
> Q. In other words, if there is a shipment sent to the Union Brokerage Company and there was no one there to handle it for them some other broker made an application to the forwarding railroad for a shipper's certificate and that forwarding railroad would then have to communicate with the shipper and get the authority to issue the shipper's certificate?
>
> A. Yes.
>
> Q. That is all that amounted to?
>
> A. Yes."

There is nothing in the record to the effect that bills of lading were dishonored, repudiated, altered or destroyed in order that the respondents might appropriate petitioner's business. Jensen did not issue any carrier's certificates as the same were issued only by the direct authority of the shippers, and not otherwise. A rubber stamp with Jensen's name thereon was used when Jensen was finally determined, in certain cases, to be the broker. Jensen, therefore, could not "convert" petitioner's business, as such business was solely the shippers who could deal with anyone they designated. The

above quoted testimony of Claude Phillips speaks for itself and needs no further explanation.

Petitioner represents that an importer electing to clear his own shipments must comply with the requirements imposed on a broker before his shipments can be cleared. Such is not the situation. Under the Regulations of 1937, an importer or his employee need not be licensed as a customhouse broker and he need only furnish a single entry bond covering the value of the shipment and the estimated duties, in place of the term entry bond.

Petitioner also represents that "the broker is relied on by the government for protection of the public revenues" (p. 11). This is wrong. The federal government is amply protected in its revenues and collection of duties: first, by the requirement of sufficient bond by the importer or agent or broker; and, secondly, under the law the government can retain possession of the merchandise until the duty is paid, and can enforce or conduct a sale of the merchandise for the payment of duty (Secs. 490, 491, Tariff Act of 1930). The customhouse broker, therefore, does not protect the public revenues. He acts merely, as held by the Minnesota Supreme Court, as an independent contractor in rendering strictly personal services for the owners of shipments. This service is performed wholly within the confines of the state in which he operates.

Under the heading of "Fact Summary" petitioner again makes the statement that respondent Jensen converted its business to himself by setting up a business at Noyes, Minnesota (p. 11). Again we repeat that petitioner had operated at only one place, namely, Portal, North Dakota, and had never had an office at any other state, city, village, or place until after respondent Jensen had opened his own office at Noyes, Minnesota, three

hundred miles easterly of Portal, North Dakota. Petitioner in December, 1940, set up its own business in competition to respondent Jensen. As submitted above, there was no conversion of any business.

Under the factual summary, petitioner now splits the ultimate issue into four parts. There is but one ultimate issue in this case. The Supreme Court of Minnesota so held and summarized the ultimate issue as follows:

> "Did the customhouse brokerage business conducted by plaintiff (petitioner) in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce" (R. p. 737) (9 N. W. (2d) 727).

This ultimate issue as so summarized presents the only question and the only issue in this case.

III.

JURISDICTIONAL STATEMENT SUPPLEMENTED

Respondents have no quarrel with the jurisdictional statement made, except that there should be incorporated for the court's information the following regulations of the Treasury Department concerning customhouse brokers:

> "Article 1410 Customs Regulations of 1937.
>
> **Licenses for More Than One Customs District.**—Separate licenses shall be required if the licensee desires to transact customs business in more than one customs district. However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the state

or states in which such other district is situated, and is prepared and qualified to render efficient service in such other district. * * *" (Emphasis supplied.)

"Article 1411 Customs Regulations of 1937.

License, When Not Required.—(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.

(b) A common carrier transporting merchandise for another may make entry for such merchandise for transportation in bond without being licensed as a customhouse broker.

(c) A resident agent employed by one or more vessels or lines of vessels is not required to be licensed as a customhouse broker in order merely to enter or clear vessels consigned to him by a principal. Proof of the agency must be filed with the collector.

(d) An employee of a licensed customhouse broker is not required to be licensed in order to act solely for his employer, but in order that such employee may sign customs documents on behalf of his employer the broker must file with the collector a power of attorney for that purpose. Each broker shall file with the collector at each port where the business is to be transacted an authorization specifically naming each employee who may properly act for him. A broker must promptly give notice of any change in the authority of such employees and must exercise such supervision of them as will insure proper conduct on the part of the employees in the transaction of customs business. Each broker will be held strictly responsible for the acts or omissions of his employees within the scope of their employ-

ment, and for acts or omissions of such employees which, in the exercise of reasonable care and diligence, the broker should have foreseen. Every attorney in fact acting for a licensed customhouse broker must be a resident of the United States."

IV.

REASONS FOR DENIAL OF WRIT

Petitioner has set forth twelve reasons for the allowance of the writ. These claimed reasons will be briefly analyzed in order that this Honorable Court may be informed that there is in fact no important question of federal law involved and the case is not one of importance to the government of the United States, customhouse brokers, and people generally (p. 30).

1.

The first reason advanced by petitioner is that the Minnesota Supreme Court decision has caused petitioner great and irreparable injury (p. 30). This, if true, is a personal matter between petitioner and respondents and does not raise a question of national concern nor does it affect in any way the Tariff Act of 1930, as amended, or the public revenues of the United States, or in fact any federal law, treaty, or the constitution. The petitioner, a North Dakota corporation, saw fit not to comply with the Foreign Corporation Act of the State of Minnesota. Had the petitioner so complied and thus placed itself on a parity with Minnesota domestic corporations, petitioner would have necessarily been permitted to prosecute any action it might have in Minnesota courts.

2.

The second reason advanced is that petitioner now claims that this is the first case in which this Honorable Court has had directly before it the construction of Section 1641, Title 19, U. S. C. A., as amended, and the rules and regulations of the Treasury Department relating to customhouse brokers and their relation to the tariff revenue system of the United States, and to foreign commerce (p. 30).

The record clearly discloses that at no time in this case was the construction of the Tariff Act, Regulations, any other federal law, treaty or constitution, questioned. Such act and all regulations promulgated pursuant thereto were accepted without question by petitioner respondents, the State District Court, and Supreme Court of the State of Minnesota. There is, therefore, no question of construction presented to this court.

The only issue decided by the Minnesota Supreme Court, which petitioner is now requesting this court to be reviewed, is whether or not petitioner, Union Brokerage Company, a North Dakota Corporation, in order to legally function as an incorporated customhouse broker in the State of Minnesota, must first qualify under the Minnesota Foreign Corporation Act before it can transact customhouse brokerage business in the state and have the privilege of maintaining actions in the Minnesota courts. As heretofore pointed out, the regulations expressly provide that a licensed customhouse broker licensed to do business in one district may transact business in another district, without further examination, "provided it appears on investigation that the licensee is authorized to do business in the state or states in

which such other district is situated, and is prepared and qualified to render efficient service in such other district" (Article 1410, Customs Regulations of 1937) (Emphasis supplied).

3.

The third reason submitted by petitioner is the claim that this is the first case in which this court, or other United States courts, have had directly before them for construction the question of whether or not a customhouse broker is an instrumentality provided for by congress, employed to protect the national revenue, the importers, and exporters, and aid in the free flow of commerce between foreign nations and the United States (pp. 30, 31).

A customhouse broker is in no sense an employee of the federal government and particularly, he is not employed to protect the national revenue; neither is he an instrumentality of interstate commerce. The Minnesota Supreme Court decision very ably summarizes the duties of customhouse brokers, and under the authorities therein cited, it is clear that a customhouse broker is not a federal instrumentality in any sense and that whatever part a customhouse broker has with relation to interstate commerce is indirect, remote, and collateral thereto. Reference is made to the cases of:

State v. Oberle, Inc., 190 La. 1053, 183 So. 347;

Federal Compress and Warehouse Co. v. McLean, 291 U. S. 17, 54 S. C. T. 267, 269, 78 L. Ed. 622;

People ex rel. Tower v. State Tax Commission, 282 N. Y. 407, 26 N. E. (2d) 955;

Duluth, S. S. & A. R. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E 763.

These cases will later be briefly discussed.

4.

The fourth reason given by petitioner is that this is the first case in which the courts have had directly before them the question of whether or not the business of a customhouse broker is interstate commerce, and, if so, if it is "interfered with" or "burdened" by such restrictive requirements as those imposed by the Minnesota Foreign Corporation Act, requiring the petitioner, before it can have access to the courts of Minnesota, and before it can do business in the State of Minnesota, to qualify, pay the same franchise tax as a domestic corporation, and to appoint an agent upon whom service of process can be made (p. 31).

This very question of whether or not customhouse broker is engaged in interstate commerce has been decided by the Louisiana Supreme Court in the case of State v. Oberle, Inc., 183 S. 437, supra. This case is cited with approval in the Minnesota Supreme Court case. In that case, it was definitely held that the Louisiana occupational license tax, to which Louisiana sought to subject defendant, as a customhouse broker, did not interfere with the commerce laws of the United States, and, particularly the importation and exportation of commerce. In answer to the defense that a customhouse broker was engaged in interstate commerce, that court held in effect that a licensed customhouse broker was an independent contractor, engaged in rendering strictly personal services in the state and is not an instrumentality of the federal government so as to be immune from such occupational tax. See also:

Duluth, S. S. & A. R. Co. v. Wilson, 167 N. W. 55, supra;

People ex rel. Tower v. State Tax Commission, 282 N. Y. 407, 26 N. E. (2d) 955;

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

5.

The fifth reason of petitioner is predicated upon the alleged ground that this case of the utmost importance to the federal government and particularly to the Department of Treasury and that it affects or protects the public revenue and foreign commerce (p. 31).

Respondents fail to see why this case, in any degree whatsoever, is important to the Federal Government or the Department of Treasury. No claim has been made in the trial of the case in the lower court, or in the appeal to the Minnesota Supreme Court, that the public revenue in any way, shape, or manner is jeopardized. The United States government has not lost one cent on account of the customhouse broker activities of petitioner or respondents. The Federal Government by virtue of the Tariff Act and the regulations is fully protected in the collection of duties, as provided by law, and as heretofore set forth, through the medium of required bonds, the custody of shipments until the duty is paid, etc. It is again repeated that none of the provisions of the Tariff Act nor of the regulations, nor the construction of the same, are involved in this controversy. The sole and only question is whether or not the State of Minnesota has the right to require a foreign corporation, before it can engage in business in the State of Minnesota, and have use of its courts, must, as a condition precedent thereto, qualify under such state law, pay the franchise tax equal to that of domestic corporations, and appoint a resident agent upon whom service of process might be made. Had

petitioner obeyed the law of the State of Minnesota, it would have had the same privileges as are afforded domestic corporations. The Minnesota Supreme Court holds that a customhouse broker is neither a federal instrumentality nor engaged substantially in interstate commerce, and that such foreign corporation, the petitioner herein, is not immune or above the Minnesota State Law requiring compliance with its Foreign Corporation Statute.

6.

Under the sixth reason, petitioner states that the Minnesota Supreme Court decision appears to be in conflict with its own prior decisions on the subject of what constitutes "commerce," and a "burden" or "obstruction" to commerce (p. 31).

Respondents quarrel with such statement. On the contrary, it plainly appears, from the able opinion written by Justice Youngdahl, that this decision harmonizes with its own prior decisions of the Minnesota Supreme Court in accordance with citation of Minnesota cases in such opinion.

7.

The seventh reason given is that probably the Minnesota Supreme Court decision conflicts with decisions of this Honorable Court defining commerce with foreign nations (p. 32).

Analysis of cases of this court, as hereinafter discusseed in this brief, conclusively show that the decision of the Minnesota Supreme Court is in accord and in harmony with pertinent decisions of this court.

8.

The eighth reason advanced is that the Minnesota Supreme Court decision recognizes that there is involved an important question of federal law not heretofore ruled on by this court and which should be settled by this court (p. 32). The Minnesota Supreme Court, through the opinion of Justice Youngdahl, states: (9 N. W. (2d) 725) R. 734

> "Probably no subject in the field of law has created greater ambiguity and confusion among text writers and court opinions than the interpretation of the commerce clause of the constitution. **Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest.**" (Emphasis supplied.)

Accordingly the Minnesota Supreme Court decision is founded upon decisions of this court and the principles evolved thereunder.

9.

The ninth reason cited claims that the Minnesota Supreme Court decision challenges the effectiveness of a license issued by the Federal Government and denies the validity and authority ostensibly conferred thereby on the licensee in a district embracing more than one state because same denies petitioner the right to appeal to the Minnesota courts for protection of its property in that part of the district which lies in Minnesota (p. 32). The Minnesota decision does not directly or indirectly challenge a customhouse broker's license or its effectiveness in any sense whatsoever. Neither is the validity of any such license, up to petitioner's petition in

this action, questioned. It again appears that petitioner is evading the simple, ultimate issue or question decided by the Minnesota Supreme Court: whether or not petitioner, a foreign corporation, must, in doing business in Minnesota, qualify under the Minnesota Foreign Corporation Act before it can maintain an action in Minnesota courts. None of the statutes, codes, or regulations of the Federal Government concerning the Tariff Act or the licensing of customhouse brokers have been challenged in this suit.

10.

The tenth reason of petitioner is based upon the claim that if the Minnesota Supreme Court decision becomes a precedent that then an incorporated foreign customhouse broker "will necessarily be forced to suffer the burden of qualifying and keeping qualified, as a foreign corporation" in the states in which it does business (p. 32). Most states in the union, if not all states, have foreign corporation statutes somewhat similar in tenor and effect. The principal purpose of such act is, that, if such foreign corporation does actually do business within the confines of a state, it must be placed in the same category, or on a parity, with domestic corporations. It is a reasonable requirement to impose the same franchise tax as it imposes upon its own domestic corporations. Further, by qualifying in the state, it insures proper service of process upon such foreign corporation without forcing a legitimate claimant to seek redress in a foreign jurisdiction or state. Petitioner would have a foreign corporation enjoy greater benefits and immunities than those which a state grants to its own domestic corporations or persons. It would have petitioner reap the benefits of doing business in Minnesota and be sub-

jected to none of the burdens, rules, regulations, and laws applicable to native corporations and citizens.

11.

The eleventh reason given by petitioner for allowance of the writ is based upon the charge that the Minnesota Supreme Court's decision was probably the result of a "confused concept" of the problem involved in the case and, that but, for this confusion, the result would have been different (pp. 32, 33). The petitioner calls attention to the Minneosta Supreme Court's summation of the ultimate question in the case. Petitioner further believes that the Minnesota Supreme Court was "confused" in its finding or definition as to the duties and activities of a customhouse broker. The petitioner quotes from the Minnesota Supreme Court decision as follows:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff **in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce**" (R., p. 737) (9 N. W. (2d) 727).
>
> * * * * *
>
> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, **it seems to us that the statutory requirement is not an obstruction or interferences with interstate commerce**" (R., p. 739) (9 N. W. (2d) 728).

Respondents fail to see where the ultimate question, as above quoted, and the clear holding concerning customhouse brokers, is in any sense a confused one, or vague or uncertain in any sense or manner. It would seem if the decision were confusing or ambiguous in any way that the proper remedy of petitioner would have been to petition for a rehearing by the Minnesota Supreme Court, in order to give that court, if it so desired, the opportunity of clarifying its decision.

On the contrary, respondents maintain that the Minnesota Supreme Court, predicated upon decisions of this court, has very ably analyzed and defined the ultimate question in the quotation first above set forth, and has further very ably made its finding as to the activities and duties of a customhouse broker. It is crystal clear that the Minnesota Supreme Court not only has a keen conception of the problem presented, but also it decided said question of interstate commerce with relation to a customhouse broker in a manner harmonious with the decisions of this court.

12.

The twelfth and last reason given for granting the petition is that public interest will be promoted by prompt settlement of the questions involved which are vital and important to the government of the United States, customhouse brokers, and petitioner (p. 33).

For reasons hereinabove given, it is clear that this is not an important question to the government of the United States nor to customhouse brokers, nor the people generally. This case involves the simple issue of whether or not the petitioner, a foreign North Dakota corporation, can operate and maintain an office and business in the State of Minnesota, use the Minnesota courts

in an action for its benefit, without being amenable to the Minnesota Foreign Corporation Statutes which require such foreign corporation to obtain a certificate of authority, pay the same franchise tax or fees as domestic corporations do, and appoint an agent upon whom service of process can be made. It is not a question of public interest. It concerns only the petitioner and respondents. The Supreme Court decision lays down the simple and reasonable requirement that foreign corporations shall have no greater privileges or benefit than that afforded to its own domestic corporations.

V.

FURTHER ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT AND STATEMENTS IN SUPPORT THEREOF

A.

THE SOLE QUESTION AND ULTIMATE ISSUE

The Minnesota Supreme Court, in reviewing the State District Court, considered only respondent's assignment of errors I A and D (R., pp. 753, 754), and reversed the State District Court on the ground that said court was in error as a matter of law in holding: * * * that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce by the United States and the Dominion of Canada (part of findings 5, R., p. 699, f. 1).

The Minnesota Supreme Court, in reversing the judgment of the District Court, did not deem it necessary to pass upon the numerous other assignments of error. Therefore, the only question, and ultimate issue in this

case, as decided by the State Supreme Court, and which can be considered by this Honorable Court, is the ultimate issue and question so aptly and ably expressed by the Minnesota Supreme Court as follows:

> "Did the customhouse brokerage business conducted by plaintiff (petitioner herein) **in a substantial way interfere with or obstruct the execution of the granted power of congress to regulate interstate commerce**" (R., p. 737) (9 N. W. (2d) 727).

This Honorable Court is invited to read the well written, clear, and concise opinion of the Minnesota Supreme Court, as it is apparent from said opinion that that court, in deciding this ultimate issue, engaged in exhaustive study and research. The Minnesota Supreme Court arrived at its decision by analyzing the numerous decisions of this court for the controlling principles upon which its decision rested. Justice Youngdahl has so stated, as evidenced by his statement as follows:

> "Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest" (R., p. 734) (9 N. W. 725).

This has been the policy of the Minnesota Supreme Court, where federal questions are concerned, as evidenced by the cited case of Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

B.

CUSTOMHOUSE BROKER'S BUSINESS AND NATURE OF SERVICE RENDERED

(1)

In view of various statements made by petitioner, and its argument concerning customhouse brokers and their activities, respondents deem it necessary to commend to some extent on the functions and duties of customhouse brokers in order that this court might be rightfully informed thereof.

Petitioner would have this court believe that all shipments of merchandise from Canada arriving at a port of entry in the United States can go no further until released from customs by means of the services performed by the customhouse broker (brief, pages 36, 37). Such is not the situation, as, under the Tariff Act and Regulations, shipments can be made in bond from a port of arrival to another port (Article 1411 (b), Regulations of 1937).

Further, under the Tariff Act and Regulations, it is not necessary for the shipper or importer to employ the services of a customhouse broker. The owner of the shipment, his agent or employee, may clear through customs without the services of a broker (Article 1411 (a), Regulations of 1937).

Petitioner's petition further states that the customhouse broker is relied on by the government for protection of the public revenues (Pet. Br., page 11). Respondents have heretofore stated in this brief that under the Tariff Act and Regulations the duties and revenue of the Federal Government are fully protected by possession of the merchandise until all duties are paid or by virtue of

bonds whether such bonds are furnished by the customhouse broker or the owners of the merchandise. It is clear, therefore, that a customhouse broker in no manner protects or conserves the revenue of the United States.

(2)

Customhouse Broker Is Not a Federal Instrumentality

Petitioner quarrels with the Minnesota Supreme Court decision which holds that Union Brokerage Company, petitioner herein, is not engaged in interstate commerce, and that petitioner is not an instrumentality employed to protect the revenue of the United States and to aid in the free flow of foreign commerce.

The Minnesota Supreme Court held that petitioner was an independent contractor, rendering personal services within the confines of the State of Minnesota; that petitioner was engaged in intrastate commerce for profit; and that the activities of petitioner in relation to interstate commerce were only remote and would not encroach substantially thereon. The Minnesota Supreme Court held further that the Minnesota Statutes requiring foreign corporations to obtain certificates of authority before bringing action in state courts is a reasonable requirement as applied to a foreign corporation operating an intrastate brokerage business in Minnesota.

Respondent, in such Minnesota Supreme Court case, contended that the State District Court committed error in holding that petitioner was a federal instrumentality engaged in commerce. Respondents maintained that the business of petitioner was purely local and intrastate in character, and, that if it interfered with interstate commerce at all, it did so indirectly and as an aid or

facility of such commerce, and that petitioner was, therefore, subject to the provisions of the Minnesota Foreign Corporation Act. This position and contention of respondents was upheld by the Minnesota Supreme Court.

The Minnesota Supreme Court in deciding that petitioner was not a federal instrumentality nor was engaged in interstate commerce, and discussing the character of petitioner's business said:

> "In applying this principle so recently enunciated by the Supreme Court of the United States to the facts here presented, it is necessary to consider the character of the business in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E, 763; People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955; State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347. True, under the Tariff Act, customhouse brokers are required to be licensed in order to do business, but the sole purpose of that requirement is to protect the collection of tariffs due the federal government. State v. Wm. J. Oberle, Inc., supra. The office of plaintiff was situated in Noyes, Minnesota, and all of its records pertaining to that business were kept there. The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce. Its duty as an agent of the shipper was merely to pay the customs duties and make settlement subsequently with its principal, the shipper. Customhouse brokers represent private persons. They receive no fees or emoluments from the federal government. A customhouse broker's license authorizes the holder to transact business in certain customs collection districts. He cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the

department. We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. It is urged that because the customhouse broker pays the duties he has a direct and substantial connection with the commerce; that the commerce would be delayed if the duties were not paid. It must be borne in mind, however, that under the tariff act the shipper himself or his agent can perform this service. Article 1411, Custom Regulations of 1937, provides in part: '(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.' The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce" (R., pp. 737, 738) (9 N. W. (2d) 727, 728).

A case cited and quoted from at length in the Minnesota Supreme Court decision is the Louisiana case decided in 1938, State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347.

In that case the state of Louisiana attempted to impose a state occupational tax on a customhouse broker, Wm. J. Oberle, Inc. The action was brought to compel the defendant customhouse broker at New Orleans to pay such occupational license tax based upon the broker's receipts from importers. The state contended in that case that the defendant was engaged in a purely private business and was subject to such general occupational

tax. The defendant customhouse broker asserted that he was duly licensed by the Secretary of Treasury of the United States and could not be subjected to any occupational license tax as same would unconstitutionally burden a purely federal and quasi federal function and would interfere with the commerce laws of the United States. The lower state court held for the defendant customhouse broker that said state occupational tax law was unconstitutional in so far as same applied to customhouse brokers. The state appealed from this judgment, and the Louisiana Supreme Court reversed, holding that a customhouse broker was subject to the Louisiana occupational tax. The Louisiana Supreme Court, in so holding, discusses very ably the activity of customhouse brokers, its relation, if any, to the interstate commerce, and the reason such occupational tax was valid as applied to customhouse brokers.

The Louisiana Supreme Court, in holding that a customhouse broker was engaged in intrastate commerce only, that said broker was not a federal instrumentality and that the broker was subject to the Louisiana occupational tax, said:

> "(1) It is true that defendant is a customhouse broker, duly licensed by the Secretary of the Treasury of the United States under Section 641 of Article 1391 of the Tariff Act of 1930 (Transcript, p. 3).
>
> -1- But we fail to find any provision in the Tariff Act of 1930 to the effect that customhouse brokers are agents of the National Government, discharging governmental functions.
>
> To the contrary, the Treasury Department defines a customhouse broker as including 'all persons, partnerships, corporations, and associations transacting customs business at a customhouse in behalf

of others generally.' Art. 1392 of Tariff Act of 1930. (Transcript, p. 7.)

Customhouse brokers represent private persons. They receive no fees or emoluments from the United States Government, as testified by the president of defendant (Transcript, pp. 26, 27).

A customhouse broker's license only authorizes the holder to transact business in customs collection districts. They cannot represent a claimant before the Treasury Department, unless enrolled as attorney or agent in conformity with the requirements of the department (Department Circular No. 230, Treasury Department 42773). Arts. 1402 and 1403 of Tariff Act of 1930 (Transcript, pp. 13, 14). This is very far from being an agent of the United States, or being engaged in a governmental function. They are no more discharging governmental functions than are the lawyers licensed to represent their clients before the Treasury Department (Art. 1403, Transcript, p. 14). At the most, customhouse brokers are independent contractors, pursuing a private business for profit, and the fact that their occupation is regulated by law does not make those engaged therein government officials, or result in immunity from taxation.

In Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 269, 78 L. Ed. 622, the Supreme Court of the United States said:

'Appellant's license under the United States Warehouse Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehouse Act (7 U. S. C. A. No. 241, et seq.) confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of

storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. Susquehanna Power Company v. State Tax Commission, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042; Fox Film Corporation v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Broad River Power Company v. Query, 288 U. S. 178, 180, 53 S. Ct. 326, 77 L. Ed. 685.'

* * * * *

'The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co. v. State Tax Commission, supra; Broad River Power Company v. Query, supra. See Willcutts v. Bunn, 282 U. S. 216, 226, 230, 51 S. Ct. 125, 75 L. Ed. 304 (71 A. L. R. 1260).'

It is clear from the above decision that the mere extension of control over the business of customhouse broker by the national government does not withdraw it from a local tax, as defendant, in the enjoyment of the privilege under its license, is engaged in its own behalf, and not in behalf of the government, in the conduct of a private business for profit.

As the local tax claimed by the state in this case does not impose a burden upon a federal function,

it presents no obstacle to the national policy in the control and administration by the government of its customs. Obviously, the concern of the government is to see that the proper duties are collected, and the licensing of competent customhouse brokers is merely in promotion of the governmental policy. But neither the defendant, nor its business of customhouse broker, was, by the force of the license, converted into an agency or instrumentality of the federal government.

-2- (2) We fail to see wherein the occupational license tax to which the state seeks to subject defendant, as a customhouse broker, would interfere 'with the commerce laws of the United States and particularly the importation and exportation of commerce,' as contended by defendant. The evidence fails to show that defendant is engaged in either. Defendant receives its business from importers of medchandise, private persons (Transcript, pp. 26, 27). Defendant is not itself an importer of merchandise. If it were, it would not be licensed as a customhouse broker" (183 So. 347, 348).

In one of the very few cases concerning the question as to whether or not the customhouse broker is a federal employee, a federal instrumentality, and the nature of his duties, we find the case of Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E, 763, cited in the Minnesota Supreme Court decision, wherein it is stated:

" 'He is invested with no part of the sovereign functions of the government. He is the agent of the importer, and deals with the government in that capacity. Moreover, his duties are not analogous to those of an executor or administrator. * * * He may act for whom and so far as he pleases. The license merely gives him the privilege of entering the goods for those who choose to employ him and for whom he chooses to perform such service.

* * * * *

> "**The character of the employment of a customhouse broker is private, as distinguished from public. His intervention is not necessary in the importation of goods.** The importer may make his own entry, or may employ any broker who has a license. The broker is paid by the importer, and is, as a matter of fact, his agent for the single transaction of entry. He performs no duties on behalf of the public, and the public is not concerned about his fees. **There are no considerations of public policy intervening which would affect the disposition of his earnings. His services stand upon no other basis than any other private employment.'** " (Emphasis supplied.)

The Minnesota Supreme Court decision also cited the New York case of People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955. In that case the State of New York enacted a so-called unincorporated business tax law upon various types of non-corporate enterprises competing with corporations in the state which are required to pay a corporate franchise tax measured by net income. That law exempted professions from its application. C. J. Tower & Sons was a partnership consisting of three partners devoting all their time to partnership affairs. It was held that the three partners were not practicing a profession within the meaning of the statute, and that, said partnership could have incorporated as such and transacted business as a customhouse broker. In such case, although the court did not make a direct finding that customhouse broker are or are not engaged in interstate commerce, such court calls attention to the fact that the nature of the business is that of rendering personal service to patrons, importers and exporters. It is clear, of course, that were customhouse brokers engaged in interstate commerce, or substantially so engaged, such broker

would not be subjected to the franchise tax of the State of New York.

A case very analogous to this case is that of Hopkins, et al., v. U. S., 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40. In that case Hopkins, et al., were engaged in the commercial business dealing in livestock in stock yards in Kansas City, Missouri, such stock being shipped from various states and to various states. Hopkins, et al., had agreed upon uniform rates to be charged for their services and the work performed was in the nature of a personal service association. The question of whether or not Hopkins, et al., had attempted to restrain trade and commerce among the several states directly raised the question as to whether or not the said Hopkins, et al., were engaged in interstate commerce. In that case this Honorable Court delves deeply into the question as to what constitutes interstate commerce, and when such firm or person is subject to state laws, or beyond the operation of state laws, and, therefore, subject to federal law concerning interstate commerce and restraint of trade. Inasmuch as Hopkins, et al., were livestock brokers or agents engaged in performing personal service in connection with interstate shipments, it is clear that the situation is very analogous to the services performed by a customhouse broker, who likewise performs personal services in connection with interstate commerce, which services, however, are merely collateral to interstate commerce.

This Honorable Court in holding that Hopkins, et al., livestock brokers, were engaged in purely local intrastate services said:

> "On the contrary, we regard the services as collateral to such commerce, and in the nature of a local aid or facility provided for the cattle owner

towards the accomplishment of his purpose to sell them; and an agreement among those who render the services, relating to the terms upon which they will render them, is not a contract in restraint of interstate trade or commerce."

This court further said:

"The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner, whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of, and which itself constitutes, interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation. Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself. They are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold." (Emphasis supplied.)

In the case of Hooper v. People of the State of California, 155 U. S. 648, 15 S. Ct. 207, it was held by this court that the business of marine insurance, like any other insurance business, is not commerce or an instrumentality thereof, but merely an incident thereto and therefore, the constitutional provision as to interstate commerce did not prevent a state from prescribing con-

ditions upon which a foreign insurance company may do business in the state or from enforcing such conditions.

In 12 Corpus Juris, page 35, Sec. 36 (9), it is stated:

> "The business conducted by brokers and commercial merchants, or of exchanges of which they may be members, is not interstate commerce."

From the foregoing leading cases on the subject, it is clear that customhouse brokers are not federal employees or instrumentalities; that their duties are purely personal in nature rendered at the port of entry where their business is situated, and, that if their activities affect interstate commerce at all, such personal services are collateral and remote thereto, and that such services are merely incidental to interstate commerce.

C.

CUSTOM REGULATION RECOGNIZES THE LOCAL AND INTRASTATE CHARACTER OF THE BUSINESS OF CUSTOMHOUSE BROKERS

In scrutinizing the Tariff Act, particularly with reference to customhouse brokers, and the regulations promulgated by the Secretary of Treasury pursuant thereto, we find only one regulation which touches upon, and, which aids and assists in the interpretation which the Federal Government itself places upon the character and nature of the business of customhouse brokers. This regulation is Article 1410, Customs Regulations of 1937, which in part is as follows:

> "However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the state or states in which**

> **such other district is situated,** and is prepared and qualified to render efficient service in such other district." (Emphasis supplied.)

Here the Federal Government expressly makes it a condition precedent for a broker who has a license in one district, and who desires to operate in another district, without further examination, to first satisfy the Federal Government that it has complied with the requirement that said broker "is authorized to do business in the state or states in which such other district is situated." The Federal Government, therefore, directly recognizes the local and intrastate character of the business of a customhouse broker.

The Minnesota Supreme Court, in the decision involved herein, states that the United States Treasury Department has thereby placed a practical construction on the character of the customhouse brokerage business as affecting commerce, by saying:

> "Subsequent to the adoption of this regulation, congress amended the tariff act in several respects, although the provisions governing customhouse brokers have remained substantially the same. By such regulation the treasury department has placed a practical construction on the character of the customhouse brokerage business as affecting commerce. It infers that it was the opinion of the treasury department that the statutory provision requiring a certificate of authority from a foreign corporation, as relating to such business, did not encroach upon interstate commerce. The provision that brokers may qualify to do business in more than one district, provided they are authorized to do business in the particular states in which such other districts are located, definitely implies that the department considers such business truly local and intrastate; and surely, if the business is intrastate when operated in two or more districts, it is equally intrastate

when operated in a single district. Inasmuch as the tariff act was revised subsequent to the regulatory provision referred to without modifying this provision referred to without modifying this provision, 'under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.' Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 115, 59 S. Ct. 423, 426, 83 L. Ed. 536" (R., p. 741)) (9 N. W. (2d) 729).

It is clear that a customhouse broker is not the owner of the merchandise cleared through customs; that he does not direct nor control the buying, the selling nor routing of such shipment, and he at no time has physical contact with the merchandise. His services are strictly personal in nature, and are performed at such port of entry within the confines of the state wherein he operates. His business, therefore, is local and intrastate in character.

D.

CASES CITED BY PETITIONER DISTINGUISHED

The Minnesota Supreme Court has distinguished the cases mainly related upon by petitioner. As stated by the Minnesota Supreme Court, petitioner relies greatly upon the case of Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, and the case of Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90, 58 S. Ct. 72. The Minnesota Supreme Court has stated that the Wallace case, supra, is not in point. In the Puget Sound Stevedoring Co. case, that court states that that case, while not squarely in point, believes that that decision fortifies its position taken in this case concerning the activities of a customhouse broker.

E.

THE MINNESOTA FOREIGN CORPORATION STATUTE IS A REASONABLE REGULATION AND REQUIREMENT, AND IS NOT AN ABSTRUCTION UPON INTERSTATE COMMERCE NOR INTERFERENCE THEREWITH

This court is invited to read in its entirety the Minnesota Supreme Court case which petitioner seeks to have this Honorable Court review. The Minnesota Supreme Court has rendered a distinct service in so ably and carefully reviewing and analyzing the question of the nature of the character of the business of a customhouse broker as applied to the commerce clause, and, has further arrived at the conclusion that the Minnesota Foreign Corporation Act is reasonable, and is not a "burden" upon commerce, nor an "obstruction," nor an "interference" therewith.

The Minnesota Supreme Court in so holding, said:

> "While it is our duty fully to recognize this most recent trend in the construction of the commerce clause by the Supreme Court of the United States, we are unable to find, even in these recent decisions, any inclination on the court's part to interfere in purely local and intrastate matters. It is entirely consistent with these decisions and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our government during its century and a half of existence. Where congress has not stepped into the field of regulation because of the fact that some national public policy or concern is not involved, and where the business, as here, is local in character, relates only to personal services, is conducted for private profit, and is not an instrumentality of commerce, the courts should

be loathe to suggest that the state cannot enforce a reasonable regulation for the benefit of its citizens such as the statute here in question. The provisions of this statute require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hardship upon the business. Nor do we think that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case. On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief. Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirement is a proper regulation for the state to prescribe, and that the constitutional power of congress is in no way impaired thereby" (R., pp. 742, 743) (9 N. W. (2d) 729, 730).

VI.

CONCLUSION

It is very clear from the Minnesota Supreme Court decision, that its decision is predicated upon the cases of this and other courts relating to customhouse brokers and analogous situations. The decisions sought by petitioner to be reviewed is not in conflict with the decisions of this court but on the other hand harmonizes therewith and with the department's regulations. The Tariff Act and The Regulations, and the validity thereof, are not questioned, and need no interpretation or construction. This case is one which does not affect the public revenue. It is a case purely local in nature concerning the application of the Minnesota Foreign Corporation Statute as affecting customhouse brokers maintaining

an office and operating within the Minnesota boundaries.

Wherefore, respondents pray that petitioner's application for Writ of Certiorari be in all things denied, and that respondents recover of petitioner their costs and disbursements herein.

Respectfully submitted,

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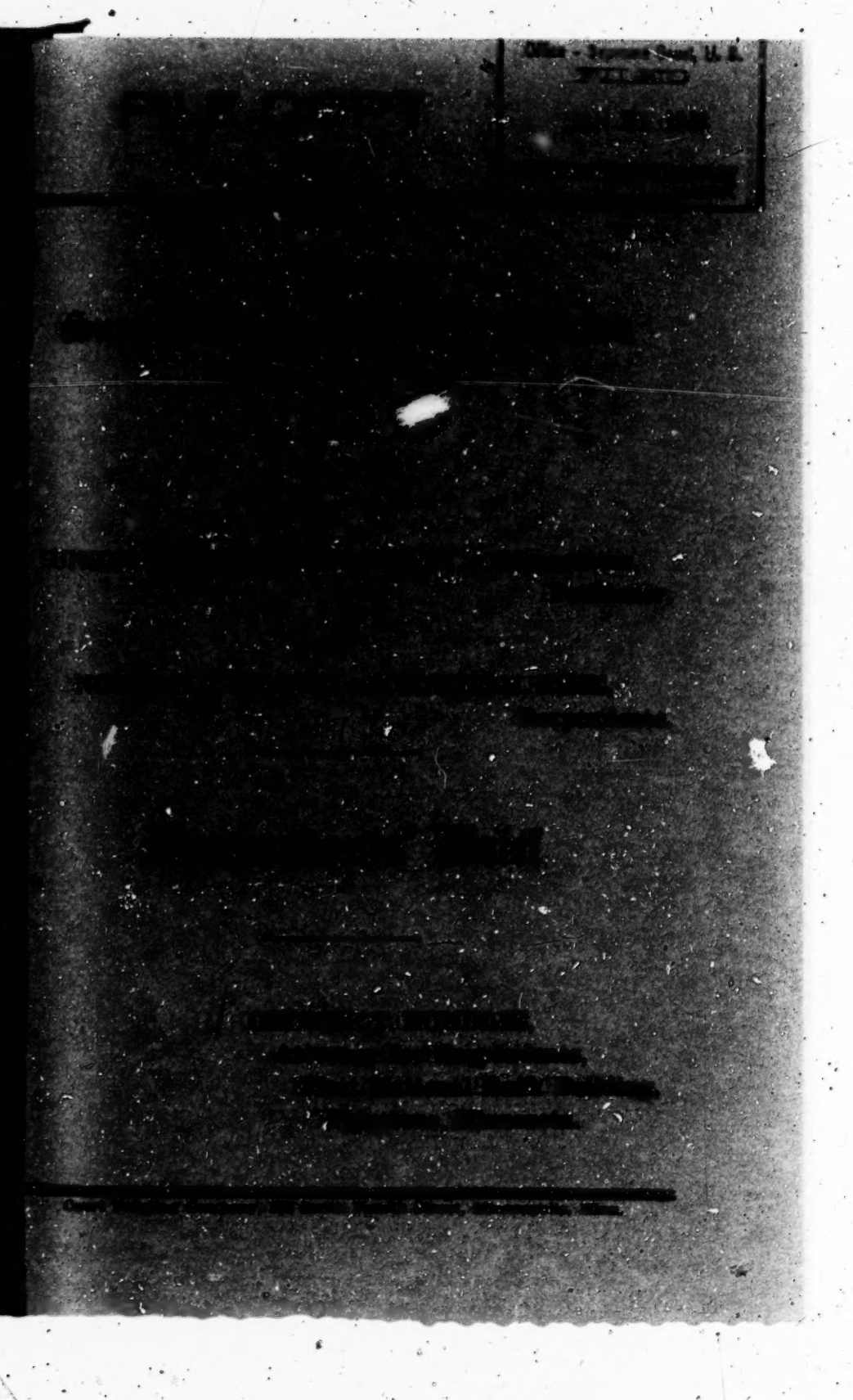

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In the Supreme Court of the United States

October term, 1943

No. 291

UNION BROKERAGE COMPANY, a Corporation,
Petitioner,

vs.

NORMAN G. JENSEN and CURTIS M. RIME,
Respondents.

Respondents' Brief

Respondents herein respectively submit their brief in opposition to petitioner's brief which seeks a reversal of the decision of the Supreme Court of Minnesota filed on May 14, 1943, and judgment docketed on May 23, 1943, reported in 9 N. W. (2d) 721 (Record p. 142).

Respondents concur in the statements contained in petitioner's brief as to **"Opinions Below"** and **"Jurisdiction"** (pp. 1 and 2).

I.

SOLE QUESTION AND ISSUE PRESENTED

Petitioner maintains that there are six questions (Brief 2 and 3) presented to this Honorable Court's con-

sideration in reviewing the decision in this case by the Supreme Court of the state of Minnesota (R. p. 142), 9 N. W. (2d) 721.

Respondents represent that there is only one question or issue presented to this Court. This is aptly stated by Justice Youngdahl, who wrote the unanimous opinion for the Minnesota Supreme Court, in the language following:

> "The ultimate question in the instant case then is: **Did the customhouse brokerage business conducted by plaintiff (petitioner) in a substantial way interfere with or obstruct the exercise of the granted power of Congress to regulate interstate commerce.**" 9 N. W. (2d) 727 (R. p. 152). (Emphasis supplied.)

Petitioner, a North Dakota Corporation, maintained a customhouse brokerage business and office at Noyes in Kittson County, Minnesota. Petitioner did not qualify under the Minnesota Foreign Corporation Act (Minn. St. 1941, Sec. 303.20; Mason St., 1940 Supp., Sec. 7495-20) requiring a foreign corporation, before it can do business in Minnesota and maintain any action in Minnesota courts, to first qualify and obtain the requisite certificate of authority to do business from the state. This, petitioner failed to do. The Minnesota Supreme Court, accordingly, reversed the State District Court.

The Minnesota Supreme Court, in effect held, under the facts summarized in its opinion, that the activities of petitioner, a foreign corporation, as a customhouse broker, were **local and intrastate** in character and had **no substantial relation to interstate commerce, and** hence petitioner would be required to first comply with the Minnesota Foreign Corporation Statute and obtain a certificate of authority to do business in Minnesota before bringing this action or any action in Minnesota courts.

It is conceded that were petitioner engaged substantially in interstate commerce that petitioner then need not qualify or comply with the Minnesota Foreign Corporation Act, and, consequently, could maintain this action in the Minnesota courts. Conversely, if petitioner is engaged in business which only collaterally, incidently or remotely affects interstate commerce, as the Minnesota Supreme Court held, then petitioner's business is intrastate in character and petitioner is amenable to the Minnesota Foreign Corporation Act.

This then, presents the only and ultimate question before this Honorable Court.

II.

STATUTES AND CUSTOMS REGULATIONS INVOLVED

Under this heading, petitioner has failed to include under the "Appendix," Section 6 of Rules and Regulations Relating to Customhouse Brokers, U. S. Treasury Dept. Circular, No. 559, also designated as Article 1410, Customs Regulations of 1937 (Art. 1396 of 1930 Regulations as pleaded in petitioner's reply, R. p. 26).

This omitted regulation which constituted a part of Petitioner's (Plaintiff's) Exhibit A offered in evidence upon trial (R. p. 56 of record in the Minnesota Supreme Court) is obviously the most enlightening and important regulation concerning customhouse brokers in connection with the ultimate and sole issue before this Court.

This regulation, Article 1410, Customs Regulations of 1937 (pleaded by petitioner in its reply as Art. 1396 of 1930 Regulations, R. p. 26) and which was considered and discussed by the Minnesota Supreme Court, is as follows:

Licenses for More Than One Customs District.— Separate licenses shall be required if the licensee desires to transact customs business in more than one customs district. However, a licensee having a license in force in one district may on application to the Committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated, and is prepared and qualified to render efficient service in such other district * * *."** (Emphasis supplied.)

Petitioner likewise failed to include in its "Appendix," the pertinent Article 1411, Customs Regulations of 1937, as follows:

License, When Not Required.—(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.

(b) A common carrier transporting merchandise for another may make entry for such merchandise for transportation in bond without being licensed as a customhouse broker.

(c) A resident agent employed by one or more vessels or lines of vessels is not required to be licensed as a customhouse broker in order merely to enter or clear vessels consigned to him by a principal. Proof of the agency must be filed with the collector.

(d) An employee of a licensed customhouse broker is not required to be licensed in order to act solely for his employer, but in order that such employee may sign customs documents on behalf of his employer the broker must file with the collector a power of attorney for that purpose. Each broker

shall file with the collector at each port where the business is to be transacted an authorization specifically naming each employee who may properly act for him. A broker must promptly give notice of any change in the authority of such employees and must exercise such supervision of them as will insure proper conduct on the part of the employees in the transaction of customs business. Each broker will be held strictly responsible for the acts or omissions of his employees within the scope of their employment, and for acts or omissions of such employees which, in the exercise of reasonable care and diligence, the broker should have foreseen. Every attorney in fact acting for a licensed customhouse broker must be a resident of the United States.

III.

STATEMENT OF CASE

Respondents deem it necessary to supplement and amend, in certain respects, as hereinafter stated, petitioner's statement of the case (Brief page 4).

On September 6, 1938, when respondent Jensen sold his brokerage business at Portal to petitioner, said Jensen also had a customhouse brokerage office and business at Northgate, North Dakota, about 13 miles easterly of Portal, North Dakota. The petitioner, Union Brokerage Company, purchased only the Portal, North Dakota, business, and permitted Jensen to operate his customhouse brokerage business at Northgate, North Dakota (District Court Finding 13, R. p. 127, f. 702; R. p. 128, f. 704).

The State District Court found that the rerouting of shipments by the Canadian Pacific Railway (hereinafter referred to as C. P. R.) through Noyes, Minnesota, rather than Portal, North Dakota, did affect 90 to 95 per cent of the brokerage business at Portal, or in other words

there was a loss of foreign shipments at Portal of 90 to 95 per cent by virtue of such change (R. p. 144, f. 730; R. p. 131, f. 708).

Petitioner was incorporated in 1928 and up to December 5, 1940, maintained only one place of business and office and that was at Portal, North Dakota. Pursuant to corporate action, petitioner authorized the establishment of an office and did establish such office, at Noyes, Minnesota, three hundred miles easterly of Portal, North Dakota (Finding 32, R. p. 136, f. 717). The rerouting of the C. P. R. took effect July 1, 1940 (Finding 23, R. pp. 131-132; R. p. 144, f. 730). Respondent Jensen opened an office at Noyes, Minnesota, three hundred miles away from Portal, North Dakota, on or about July 1, 1940 (R. p. 146, f. 733). The petitioner did establish and operate a customhouse brokerage business (December 5, 1940) at Noyes, Minnesota, shortly after Respondent Jensen's resignation from petitioner's employ on November 7, 1940, in competition with Respondent Jensen (Finding 32, R. p. 136).

The Minnesota Supreme Court in its decision has defined the duties of customhouse broker thus:

> "Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regu-

lations of customs law, as well as sufficient information to enable the broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused" (R. p. 144, f. 730) 9 N. W. (2d) 722, 723.

Respondent Jensen resigned as an officer and employee of petitioner at the request of petitioner on November 7, 1940 (Finding 28, R. p. 134).

Prior to the time that petitioner opened its office at Noyes, Minnesota, in competition with respondent Jensen, and subsequent thereto the petitioner was not authorized to act as a customhouse broker at Noyes, Minnesota, as it had failed to qualify to act as such under the regulations of the Treasury Department, and, further, had not procured from the State of Minnesota the required certificate to do business in Minnesota (R. pp. 147, 148, ff. 734, 735).

Article 1410, Customs Regulations of 1937, provides:

"However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another with further examination, provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated, and is prepared and qualified to render efficient service in such other district" (R. p. 156, f. 745). (Emphasis supplied.)

The petitioner, Union Brokerage Company, until such times as it furnished bonds and qualified as a broker at Noyes, Minnesota, could not and did not transact business as a customhouse broker at Noyes, Minnesota. Certain shipments were sent through Noyes designating the petitioner as the customhouse broker. Claude Phillips, the chief clerk for the Soo Line and the Great Northern Railways at Noyes, testified in substance that such shipments, designating petitioner as customhouse broker, were refused until the shipper designated a qualified customs house broker at Noyes. Petitioner's own witness, Claude Phillips, a former customhouse official (R. p. 83, f. 405), testified clearly as to the handling of such shipments at Noyes, Minnesota. The pertinent testimony of Mr. Phillips is found on R. p. 89 and 90, ff. 415, 416, as follows:

"Q. Did you not tell the court, in substance, that if a bill of lading came with a broker designated on it like, we'll say, the Union Brokerage Company, and that broker was not there to receive it to handle it, before a change could be made the originating railroad would have to furnish a so-called carrier's certificate?

A. Yes.

Q. And the originating railroad in order to acquire the authority to furnish that certificate would have to communicate with the shipper and have the shipper make the designation?

A. That's the way they did it.

Q. In other words, if there is a shipment sent to the Union Brokerage Company and there was no one there to handle it for them some other broker made an application to the forwarding railroad for a shipper's certificate and that forwarding railroad would then have to communicate with the shipper and get the authority to issue the shipper's certificate?

A. Yes.

Q. That is all that amounted to?
A. Yes" (See also R. pp. 75, 76, ff. 393, 394).

Jensen did not issue any carrier's certificates as the same were issued only by the carrier under direct authority of the shippers, and not otherwise (R. p. 89, f. 416). A rubber stamp with Jensen's name thereon was used when Jensen was finally determined, in certain cases, to be the broker (R. p. 93, f. 427). Jensen, therefore, could not "convert" petitioner's business, as such business was solely the shippers who could deal with anyone they designated. The above quoted testimony of Claude Phillips speaks for itself and needs no further explanation.

Under the Regulations of 1937, an importer or his employee need not be licensed as a customhouse broker and he need only furnish a single entry bond covering the value of the shipment and the estimated duties, in place of the term entry bond.

Although not germane to the sole question and issue before this Court, respondents nevertheless feel constrained to comment briefly as to certain other factual matters stated in petitioner's brief.

Petitioner (brief p. 6) states that Respondent Jensen had advance and inside information about the proposed rerouting of freight shipments by the Canadian Pacific Railway Company, effective July 1, 1940, through Noyes, Minnesota, rather than Portal, North Dakota. That said Jensen conceived the scheme of capturing petitioner's business by following such business to Noyes. Suffice it to call attention of this court to the record of the testimony of petitioner's own witnesses. Mrs. Annie Kramer, an officer and director, testified that Respondent Jensen advised her of the proposed rerouting on June 22, 1940 (R. p. 117, f. 609).

Petitioner's witness, W. F. Mackay, testified that concerning such proposed rerouting before same took place that, "Yes, the whole country knew that" (R. p. 113, f. 578).

Petitioner (brief p. 6) also states that, "By November 5, 1940, his (Jensen's) fraudulent breach of duty had been discovered." This statement can not go unchallenged. The simple fact was that petitioner had never, prior to December 5, 1940, transacted any business or maintained any office but at Portal, North Dakota. Respondent Jensen about July 1, 1940, merely set up an office at Noyes, Minnesota, 300 miles away from Portal. He had previously been permitted to retain his Northgate customhouse brokerage business only 13 miles easterly of Portal, North Dakota (R. pp. 127, 128, ff. 701-704).

Petitioner (brief p. 8) asserts that one of the issues in the case is the question whether or not the state of Minnesota may "reduce the area within which petitioner is empowered to do business as a customhouse broker by denying it the right to do business in that part of the territory or district which lies in Minnesota and which is included in the United States Customs Collection District as designed by the President of the United States pursuant to authority of Congress." We submit that this is not an issue because the question of extent of territory would have no bearing on whether or not a business is intrastate or interstate. Further, the state of Minnesota has not by any decree, statute or action reduced or attempted to reduce the area within which petitioner may practice as a customhouse broker under federal broker's license. Again respondents repeat that the only concern of the state of Minnesota as to the activities of petitioner is that petitioner who so wished to create, estab-

lish, maintain, and operate an office and its principal place of business in the state of Minnesota did so without complying with this purely local state law which simply requires petitioner to qualify, pay the requisite fees, appoint an agent upon whom service of process can be made, as a condition precedent to the privilege and right to do business within the state's borders. This, and nothing more, is the only concern that the state of Minnesota has to the activities of this petitioner. As held by the Minnesota Supreme Court, the reasonable requirement of the law requiring petitioner to first qualify under the foreign corporation act before doing business in this state, and thus place it upon a parity with domestic corporations, does not, and can not amount to, an obstruction or interference with interstate commerce. Further, "On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief" (Minn. Sup. Ct. opinion, R. p. 158, f. 747).

On pages 9, 10, 11, of its brief, petitioner refers again to the rules and regulations concerning the licensing and practicing of customhouse brokers. Here again it is deemed necessary to call attention to this Court to perhaps the most important and salient regulation which has a direct bearing on the sole issue of this case and which regulation reflects the interpretation of the Treasury Department concerning the necessity of a customhouse broker who seeks an additional license in another district, usually another state, for such broker to first qualify to do business in such district, usually a state. Customs Regulations of 1937, Article 1410, covers the present situation as this provision so plainly provides that such additional license may be granted "pro-

vided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated."

It further conclusively appears to be the interpretation, custom, practice and procedure of the Bureau of Customs, acting under direction of the commissioner, that such bureau recognizes the force and effect of state laws regarding the right, license and privilege of a foreign customhouse broker doing business in such state. While the customhouse brokers license authorizes such broker to practice throughout the area covering such license, nevertheless such federal license does not permit nor authorize a customhouse broker to entirely ignore and be immune to the laws of the state in which he or it does business.

Such, unquestionably, is the position of the Bureau of Customs issued by direction of the commissioner as evidenced by the following communication and ruling:

"(SEAL) In Reply Refer To
Office of the Commissioner 346.111

Address Reply to
Commissioner of Customs

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON

Sept. 1, 1942.

Mr. Norman G. Jensen,
Noyes, Minn.

Sir:

Reference is made to your letter of August 1, 1942 (NGJ:bm), relative to the propriety of a broker licensed in District No. 34 carrying on business as a customhouse broker in that part of the state of Minnesota which is included in Customs Collection District No. 34 without qualifying himself as a broker under the laws of the state of Minnesota.

The holder of a customhouse broker's license is authorized to transact customhouse brokerage business at any port in the district in which the license is issued, so far as the customs laws and regulations are concerned. Compliance with state laws in the customs district covered by a license already in force is entirely a matter between the broker and the authorities of the particular state involved.

By direction of the Commissioner:

Very truly yours,

G. H. Griffith,

Assistant Deputy Commissioner."

Petitioner (brief page 13) correctly states that "the customhouse broker does not load nor produce the goods moving in interstate or foreign commerce." Neither does the broker have any control over the shipment, the port of origin, the route the goods are to travel on or the railroad line or the place of delivery. He exercises no control whatsoever over the movement of these interstate shipments. His services are strictly those of record making in the clearance of the duties consisting of bookkeeping, paper work and the payment of duties. He does not come into physical contact with the shipments and his service is strictly personal, rendered wholly within the confines of Minnesota where his place of business and office was located. This strictly personal service, as an independent contractor, is entirely collateral to interstate commerce and affects interstate commerce but remotely, if at all. It is not necessary for the shippers to employ a customhouse broker to perform this paper work, pay the duties or obtain clearance of customs because the shipper or the shipper's employee can do this without being licensed. Economically, it would not be profitable for a shipper to have an employee stationed constantly at any given port where the shipments are intermittent. Hence such ship-

pers usually secure a customhouse broker, when the occasion arises, as an independent contractor to perform this paper work and personal service. A customhouse broker, as an independent contractor, is not under the supervision, direction or control of the shipper as to the means and methods of clearing shipments, such customhouse broker being only accountable to the shipper for the results obtained, and nothing more.

Petitioner (brief page 14) states, "the title of the broker dates from the time the bill of lading is executed and delivered to the carrier and shipper at the point of origin and continues until the merchandise has been released from customs." This is wrong. The broker does not have actual title to any of the merchandise shipped but by legal fiction only, the broker is deemed the owner of the shipment only for the purpose of paying the duties thereon and obtaining clearance of customs. Section 483 of the Revenue Act of the Tariff Act of 1930 provides

> "for the purposes of this title * * *
>
> (2) A person making entry of merchandise under provision of subdivision (h) or (i) of Section 484 (relating to entry on carrier certificate and on duplicate bills of lading respectively) shall be deemed the sole consignee thereof."

Petitioner (brief p. 20), in its last paragraph under statement of case, concludes that

> "the business of the customhouse broker begins at the originating station in Canada and continues thereafter until the shipment has been cleared from customs, to be thereafter transported to the buyer or ultimate consignee by common carrier."

This is not the situation. The broker's only service is performed at the port of entry. He maintains no office at the Canadian point of shipment, has no part in the

designation and routing of the shipment nor the place of destination. The broker's services are strictly of a personal nature as a independent contractor to do the bookkeeping, paper work, and pay the duties. As before stated, he has no control or direction over the movement of the shipment, does not come into physical contact with the merchandise and does not even inspect or cause same to be inspected. (Article 223, Customs Regulations of 1937 and Section 461, Tariff Act of 1930.) The broker neither loads nor unloads interstate shipments and his personal service is strictly in the nature of an independent contractor and are no more than collateral and incidental to interstate commerce. Further, under Section 484 (j) Tariff Act of 1930 it is provided, "Merchandise shall be released from customs custody only to or on order of carrier by whom the merchandise is brought to the port of which entry is made." In other words the customhouse broker exercises no control, supervision, dominion or direction over said merchandise and the routing of same.

IV.

SPECIFICATIONS OF ERROR

Petitioner has assigned seven errors committed by the Supreme Court of Minnesota.

As heretofore stated, the sole and ultimate question in this case upon which the Minnesota Supreme Court based its decision in favor of respondents, is aptly summarized by Justice Youngdahl as follows:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff **in a substantial way interfere with or obstruct the exercise of the granted power of Congress to regulate interstate commerce.**" 9 N. W. (2d) (page 737). (R. p. 152, f. 740.)

The issue, therefore, should properly be confined to this ultimate question upon which the Minnesota Supreme Court decision is based, and not otherwise.

V.

CASES CITED AND RELIED UPON BY PETITIONER, DISTINGUISHED

Petitioner, under the headings of "SUMMARY ARGUMENT," and "ARGUMENT," cites a number of cases which it contends supports its theory that the Minnesota Supreme Court erred in holding favorably to respondents herein, i.e., that petitioner, doing business within the state of Minnesota as a corporate customhouse broker, was engaged in intrastate commerce and hence must first comply with the Minnesota Foreign Corporation Act before it could maintain this action in the Minnesota courts. It appears that the majority of cases relied upon by petitioner concern cases affecting various telegraph and telephone companies, common carriers and others engaged in the actual transaction of business between states and foreign countries. With cases of this type, and the holdings therein, we have no quarrel, because the activities and business of the parties in such cases are not at all analogous to the activities of petitioner herein. Such railroad, common carrier and telegraph cases, etc., surely can be of no aid or assistance to this Court in determination of the one salient issue in this case. For that reason, it is deemed unnecessary to indulge in extended argument distinguishing that type of case. This part of the brief will, therefore, be directed only to those types of cases which may possibly, in any degree, have some bearing upon the issue herein.

While it is true that there is no decision of this Honorable Court directly passing upon the question as to whether or not the activities of a corporate customhouse broker, under the factual situation herein, substantially or actually obstruct or interfere with interstate commerce, we do nevertheless find, as will be argued hereafter, a number of cases which discuss and decide pertinent questions relative to the activities of a customhouse broker and his or its amenability to state jurisdiction. These cases are favorable to respondents and in harmony with the Minnesota Supreme Court decision. Suffice it, then, to distinguish the so-called "border line cases" relied upon by petitioner.

Petitioner cites the cases of Swift & Company v. U. S., 196 U. S. 375, 40 L. Ed. 518; Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735; and Lemke v. Farmers' Grain Co., 258 U. S. 50, 66 L. Ed. 458. In these three it was held that the business transacted was interstate business predicated upon the grounds and reasons that the shipments were interstate in character and that the shippers had control of the movement of the shipments or were the owners thereof. We have no quarrel with those decisions as clearly under the facts of those three cases, such business was clearly interstate. In the Stafford v. Wallace case, supra, Chief Justice Taft clearly distinguishes that case and the Swift case and the Lemke case from the Hopkins v. U. S. case, 171 U. S. (578) 19 S. Ct. 40, which will be discussed hereafter. In said Stafford case, this Honorable Court makes again the clear distinction between those actually engaged in interstate commerce, and brokers and persons who perform certain facilities or incidental service only in connection with interstate commerce, the Court saying (page 404 of 42 S. Ct. Rep.):

"Counsel for appellants cite cases to show that transactions like those of the commissioned men or dealers here are not interstate commerce or within the power of Congress to regulate. The chief of these are Hopkins v. United States, 171 U. S. 604, 19 Sup. Ct. 40, 43 L. Ed. 290, and Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. These cases were considered in the Swift case and disposed of by the court as follows (196 U. S. 397, 25 Sup. Ct. 280, 49 L. Ed. 518):

> 'So, again, the line is distinct between this case and Hopkins v. United States, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. **They only furnish certain facilities for the sales.**' " (Emphasis supplied.)

Petitioner also cites the case of Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, claiming that such case upholds its contention that a customhouse broker is engaged in interstate commerce. In the Crutcher case the plaintiff in error was doing business as the agent for the United States Express Company engaged in trading and doing business as a **common carrier** by express of goods, merchandise and other valuable things in interstate commerce. This Court rightfully held in that case that the express company and its agents were engaged in interstate commerce and hence state licensing and taxing laws of Kentucky were not applicable to such interstate carrier. This Court, however, did distinguish that type of case from the cases covering foreign corporations doing a strictly local business within the confines of the state. The court in the Kentucky case saying:

" 'The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporation, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous. (Citing cases.)' "

It is stressed again that petitioner's customhouse brokerage business is purely local to Minnesota and is confined solely and wholly to Noyes, Minnesota, and hence petitioner must comply with the Minnesota Foreign Corporation Statute.

Petitioner quotes (brief p. 29) from the case of James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 169. Petitioner cites such case in connection with the proposition that a state has no power to lay a tax on interstate commerce which would be a burden on such commerce. We do not quarrel with this James v. Dravo Contracting Co., decision at all, but, we do say that the simple requirement of the state of Minnesota that the petitioner pay the license fee, appoint a resident agent upon whom service of process can be made, and comply with the other provisions of Foreign Corporation Act, lays absolutely no burden or obstruction on interstate commerce. The licensing of petitioner by the state, as a foreign corporation, to do business in Minnesota surely has no direct relation or connection with interstate commerce. The Minnesota Foreign Corporation law can in no sense interfere with the performance of the federal gov-

ernment's functions. The test then is, does this simple requirement of the Minnesota law requiring petitioner to pay the foreign corporation license fee, and appoint a resident agent upon whom service of process can be made and make the reports required by state law, interfere at all in the functioning of the federal government in so far as the Tariff Act is concerned? Obviously not. That this Honorable Court recognizes the importance of reserving to the state jurisdiction for local purposes and which does not interfere with federal governmental functions is well stated in this case of James v. Dravo Contracting Co., when the Court said (page 148 of 302 U. S.):

> "The possible importance of reserving for the state jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the states are acquired."

Petitioner repeatedly cites and has quoted from the 1937 case of Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 19, 82 L. Ed. 68, 58 Sup. Ct. Rep. 72, as fortifying their position.

An analysis of that case reveals it was rightfully decided as the work which the stevedors were doing consisted of loading and discharging cargoes by longshoremen who were under the direct control and direction of the Puget Sound Stevedoring Co. Hence they were directly engaged in interstate commerce. That decision fortifies and substantiates the position of appellants here in their contention that any work or service performed which is merely incidental to, and is an aid or facility to interstate commerce, is not interstate commerce; whereas, the actual transportation or the loading or unloading of cargo under the direction of the

party having control of such labor is interstate commerce.

In the stevedore case, the opinion of which was written by Justice Cardozo in 1937, the United States Supreme Court very clearly gives this distinction and holds that if the Stevedoring Company's business consisted of merely supplying longshoremen without directing or controlling the work of loading, such service is not interstate or foreign commerce but local business subject to state taxation, Justice Cardozo saying (page 74):

> "The business of appellant (Stevedoring Co.), in so far as it consists of supplying longshoremen to shipowners or masters **without directing or controlling the work of loading or unloading,** is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state.
>
> "What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in Williams v. Fears, 179 U. S. 270, 278, 21 S. Ct. 128, 45 L. Ed. 186, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby. * * * Little analogy exists between the activities now in question and those reviewed in McCall v. California, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, 44 S. Ct. 242, 68 L. Ed. 611, 34 A. L. R. 907; and Di Santo v. Pennsylvania, 273 U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 524. The contractors there considered were found to be acting as agents of foreign steamship companies with authority to make contracts binding on the principals and even running in their names. If appellant stands in that relation to the vessels that it serves in this branch of its activities, it has failed

to make the fact apparent by the allegations of its bill. The effect of such a showing is not before us now." (Emphasis supplied.)

This stevedore case supports appellants' contention in that petitioner herein was engaged in a private local business and hence amenable to the Minnesota foreign corporation statutes. Further, that neither the shipper nor the United States government directed or controlled the activities of petitioner; that it rendered only personal service as an aid and facility of interstate commerce, and that petitioner was neither an employe or an agent of the United States government or the shipper in doing such brokerage service. A customhouse broker acts and serves as an independent contractor specializing in rendering personal service only in clearing shipments which could be performed by the shipper or its employe without a customhouse broker's license.

The petitioner has seen fit to quote somewhat at length from the findings of State District Court of Minnesota. The decision of the State District Court is not up for review by this Honorable Court. This case is before this Court for the review of the Minnesota Supreme Court decision which reversed the State District Court.

The petitioner cites the Minnesota case of Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616, as supporting its theory that it is engaged in interstate commerce. We have no quarrel with the decision of that Minnesota case. It does not aid, in any manner, petitioner in the present case. In that case the plaintiff was an Illinois corporation engaged in manufacturing of and dealing in farm machinery in that and other states, and maintained an agency in this state for the purpose only of receiving, storing, and delivering goods to purchasers in this state to whom sales were made by orders taken

by traveling salesmen, subject to the approval of plaintiff at its home office in Illinois. The agents in this state had no authority to make sales of property stored with it, or to take or receive orders therefor. Its authority was limited exclusively to delivering goods previously sold by plaintiff through its traveling salesmen. The Supreme Court's decision was clearly right in holding that plaintiff was not doing business within the state in violation of the foreign corporation statute and that its business constituted interstate commerce. The situation would have been otherwise if sales were made directly from a storehouse in this state in line with the case of Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441, cited in such case. In the Brewing Co. case plaintiff maintained in a warehouse at Waterville where large quantities of beer and liquors were stored and which were sold by a resident agent of the company and not upon orders taken by traveling salesmen. In that situation, the Brewing Company was engaged in business and was required to qualify under the Minnesota Foreign Corporation Statutes.

VI.

ARGUMENT

Petitioner, in its argument states that the Supreme Court of Minnesota did not find a decision dealing directly with the present problems but there are a few cases which deal with the functions, activities, and business of customhouse brokers. The cases cited by petitioner are four in number. Three of them are of great aid and assistance in the present case and will be discussed hereafter. These three cases, namely Duluth S. S. A. Railway Co. v. Wilson, 167 N. W. 55; People ex rel. Tower v. Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955;

and State v. Oberly, Inc., 190 La. 1053, 163 So. 347, are discussed at some length in the Minnesota Supreme Court decision. These three cases are all favorable to respondents herein.

The fourth case mentioned by petitioner is Landacke v. Merrill, 20 Fed. (2) 249, which contains a dicta to the effect that a customhouse broker is the agent of the Treasury Department. Such statement, petitioner admits, "was probably unnecessary to the adjudication of the issue actually involved in that case." That case concerned a proceeding to have a customhouse broker's license revoked and the statement which petitioner calls attention to refers to the Treasury Department "whose agent the broker is." Such statement was not a controlling element in that decision. The language used as quoted herein is loose and unfortunate because a customhouse broker is not the agent of the Treasury Department. The United States government, of course, is not bound by any of the acts of such broker. It is clear that neither under the federal customs laws nor the regulations promulgated pursuant thereto is a customhouse broker the agent or representative of the Treasury Department of the United States so that his acts become binding upon the United States as his principal.

It perhaps will be of assistance to this Honorable Court to set forth and discuss the duties and limitations of a licensed customhouse broker. The Minnesota Supreme Court ruled that a customhouse broker is an independent contractor rendering strictly personal service at the port of entry of interstate or foreign shipments and that his business as such within the state is merely incidental and collateral to interstate commerce and affects it, if at all, but remotely. It is also clear that

a broker does not come in physical contact with the interstate shipments, that he is not the importer nor the owner of the goods and neither has he any direction or control over the routing or ultimate destination of such shipments.

The activities of a customhouse broker working on the Canadian border are quite simple. A customhouse broker has no relation whatsoever to an importation before it arrives within the confines of the port of entry in the United States where he is working.

Merchandise shipped from a foreign country or state into the United States or another state is shipped on a through bill of lading from the point of origin to the point of destination within the United States. This point of destination is seldom the port of entry. It is certain that the United States Customs retains this control until the collector has received any and all duties and taxes due him or is satisfied that he will receive said duties and taxes.

After a shipment arrives at the port at which a customhouse broker is working the customhouse broker, if he wishes to clear a particular shipment, takes an invoice and a customs bill of lading, duplicate bill of lading, or carries certificate as a basis for preparing the entry. The preparation and filing of the entry is known as "clearing the shipment." (The customhouse broker may, with the permission of the collector and if properly bonded, assure the collector that he will make the entry within forty-eight hours and the collector may, if he so sees fit, release the shipment for forwarding before the entry is filed.)

The entry consists entirely of paper work, i.e., preparing and completing certain forms as determined by the customs, and, in connection therewith, the computa-

tion of the correct duties and taxes due the United States Customs.

In addition to preparing and filing an entry with the collector of customs, the customhouse broker prepares and keeps certain records and books pertaining to his transactions with the collector of customs and with his clients. These records must be kept for a period of five years.

If, after filing an entry with the collector of customs, it is determined that supplemental duty is due the collector, the customhouse broker must see that the collector is paid; if any refunds occur from an entry the customhouse broker must see that they are remitted to the owner of the merchandise.

A broker may advance his fee and the duty, as an expense item, against the shipment to be collected from the consignee or may be reimbursed by other means.

A broker does not have any physical contact with the shipment; does not inspect the shipment, nor cause the same to be done; and does not release the shipment from customs custody (the collector releases the shipment when he is satisfied that the revenues of the United States are protected or collected).

A broker does not have to clear a shipment because it is consigned to him for clearance. He may refuse to do this work for anyone. A broker is not accountable to his client for the method or means of work but is accountable for the end achieved.

Speaking generally of the business of brokers rendering personal service with relation to commerce, we find in 12 Corpus Juris, page 107, this statement:

> "It is deemed that the business of brokers is transacted wholly within the state and that they are not engaged in interstate commerce, although they

negotiate sales or transactions of interstate commerce."

Petitioner (brief p. 22) states in effect that while it owes its existence as a corporation to the laws of North Dakota that its powers to do business as a licensed customhouse broker is wholly dependent upon the laws and regulations of the United States. Assuming arguendo, that such is the situation, nevertheless such regulations recognize the necessity of a customhouse broker who has a license for one district only, and who wishes to obtain a license for another district, first satisfying the Treasury Department that such broker, as a condition prerequisite, must qualify to do business in the state or states located in such additional district. (Section 1410 of Customs Regulations 1937.) This requirement is further evidenced by the letter written under the direction of the Commissioner, dated September 1, 1942, heretofore quoted in full. It is clear, therefore, that petitioner, a corporate customhouse broker, is amenable to the Minnesota Foreign Corporation Statute both under the law of Minnesota as well as under Section 1410 of the 1937 Customs Regulations.

Petitioner (brief p. 26) states that the broker does not "follow or handle the merchandising after it has been released except that if an error is discovered in the computation of the duty which warrants that he may get the shipment recalled to the custody of the collector for one or more purposes specified in the law." The recalling of shipments for such purposes is covered by Article 316 of the 1937 Customs Regulations. Petitioner infers that the customhouse broker can recall such shipments and inferentially at least that a customhouse broker has some power or jurisdiction over the move-

ment of shipments or their recall. This is not true. The only one that can order a recall of the shipment is the collector of customs and not the customhouse broker as is so clearly stated in such Article 316.

In various places in its argument, petitioner has erroneously represented to this Court that respondents converted at Noyes, Minnesota, certain business of petitioner, and that respondents changed the carrier certificates or the bills of lading. The testimony of petitioner's witness, Claude Phillips, the railway agent at Noyes, Minnesota, heretofore quoted, refutes such statement. This point is not germane to the issue but since petitioner insists on making this claim, respondents feel constrained to inform the Court as to the facts. Mr. Phillips' testimony is crystal clear to the effect that where Canadian shipments were consigned to a named broker in Noyes, Minnesota, and where there was no such broker by that name at Noyes or such designated broker was not qualified to do business at Noyes, that then the railroad agent at such port would communicate such fact to the shipper. The shipper was then requested to designate the name of a broker located at Noyes who was licensed and qualified to clear such shipment at the port of entry. Only after receiving the authorization of the shipper, the only one who could so designate the broker, were such carrier certificates or bills of lading amended or corrected not, however, by respondents, but by the railroad company acting under direct orders or authorization from the shippers. In the cases where Respondent Jensen was then so designated by the shipper, was Jensen authorized and permitted to clear shipments.

Petitioner represents, and would have this Court believe, that a customhouse broker's activities and duties are, as to the minutest details, regulated by the federal

government. It is true that a customhouse broker is licensed by the government but this is to insure that such person or corporation is competent to handle the clearance and paper work concerning shipments. The government pays him no fees nor does the government regulate or set the amount of his fees. The mere fact that the federal government licenses persons and corporations as customhouse brokers does not by any means make such licensed broker its employee or agent nor does it mean that such licensed broker who renders strictly personal service, bookkeeping and paper work in connection with interstate shipments is engaged in interstate commerce. For instance, the state of Minnesota licenses doctors, lawyers, dentists, architects, accountants, etc., and requires examinations in order that it may be ascertained that such persons are competent to render efficient service to the public requiring such service. The federal government likewise licenses various persons for various activities, including customhouse brokers. It would seem from the argument of counsel for petitioner that he has fallen in grave error in arguing that the fact of licensing of a customhouse broker by the federal government makes such broker an instrumentality or agent of the United States and that such broker is therefore engaged in interstate commerce. A customhouse broker's business is a private business, not public. He specializes in the paper work of clearing shipments because he has qualified and has made a special study of the Tariff Act and Regulations. His activities are confined to the port of entry where he has his situs or office. He has the right to refuse business and has the right to solicit business. His charges are his own affair and he may continue to act as independent contractor in clearance of shipments so long as he abides by the law and regulations appli-

cable to his business. Should a corporate customhouse broker open an office at another district, usually located in another state. It must submit itself to such state laws and comply therewith (Section 1410 of the 1937 Customs Regulations and the letter sent under direction of the Commissioner heretofore referred to). Petitioner maintains that it is above and can ignore the Minnesota Foreign Corporation law and need not abide thereby. Petitioner has seen fit to obtain a situs in Minnesota, open an office therein, transact business and yet is unwilling to obtain a certificate of authority to do business in this state. It would enjoy the fruits and benefits of its business in Minnesota but nevertheless refuse to share any of the responsibilities borne by domestic corporations or other concerns doing business within the borders of Minnesota. Because petitioner did not qualify under the Minnesota law, it can not maintain this action.

Respondents have split up their further argument herein under separate headings as hereinafter set forth.

A.

THE SOLE QUESTION BEFORE THIS COURT

The Minnesota Supreme Court, in reviewing the findings and judgment of the State District Court, considered only respondent's assignment of errors I A and D (R. p. 148, f. 735; p. 168), and reversed the State District Court on the ground that said court was in error as a matter of law in holding:

> "* * * that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada" (part of finding 5, R. p. 125, f. 699).

The Minnesota Supreme Court, in reversing the judgment of the District Court, did not deem it necessary to pass upon the numerous other assignments of error (R. p. 148, f. 735). Therefore, the only question, and ultimate issue in this case, as decided by the State Supreme Court, and which should only be considered by this Honorable Court, is aptly and ably expressed by the Minnesota Supreme Court thus:

> "Did the customhouse brokerage business conducted by plaintiff (petitioner herein) in a substantial way interfere with or obstruct the exercise of the granted power of Congress to regulate interstate commerce" (R. p. 152, f. 740) (9 N. W. (2d) 727).

This Honorable Court is invited to read the well written, clear, and concise opinion of the Minnesota Supreme Court, as it is apparent that the Court, engaged in exhaustive study and research. The Minnesota Supreme Court arrived at its decision by analyzing the numerous decisions of this court for the controlling principles upon which its decision rested. Justice Youngdahl said:

> "Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest" (R. p. 149, f. 737) (9 N. W. 725).

This has been the policy of the Minnesota Supreme Court, where federal questions are concerned, as evidenced by the cited case therein of Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

B.

CUSTOMHOUSE BROKER'S BUSINESS AND NATURE OF SERVICE RENDERED

(1)

In view of various statements made by petitioner, and its argument concerning customhouse brokers and their activities, respondents deem it necessary to further discuss the functions and duties of customhouse brokers.

Petitioner would have this Court believe that all shipments of merchandise from Canada arriving at a port of entry in the United States can go no further until released from customs by means of the services performed by the customhouse broker (brief, pages 31, 32). Such is not the situation, as, under the Tariff Act and Regulation, shipments can be made in bond from a port of arrival to another port (Article 1411 (b), Regulations of 1937). Shipments are released, to resume their journey to destination, only on the order of the Collector.

Further, under the Tariff Act and Regulations, it is not necessary for the shipper or importer to employ the services of a customhouse broker. The owner of the shipment, his agent or employee, may clear through customs without the services of a broker (Article 1411 (a), Regulations of 1937).

Petitioner further claims that the customhouse broker is relied on by the government for protection of the public revenues (brief, page 68). Under the Tariff Act and Regulations the duties and revenue of the federal government are fully protected either by bonded shipments or by possession of the merchandise until all duties are paid by virtue of bonds whether such bonds are fur-

nished by the customhouse broker or the owners of the merchandise. It is clear, therefore, that a customhouse broker in no manner protects or conserves the revenue of the United States.

The Minnesota Supreme Court in its decision has aptly defined the duties of a customhouse broker thus:

> "Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regulations of customs law, as well as sufficient information to enable the broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused" (R. p. 144, f. 730) (9 N. W. (2d) 722, 723).

Further, a customhouse broker is an independent contractor. The Minnesota Supreme Court was right in holding that:

> "The broker acts as an independent contractor to perform this personal service for the shipper. He

does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interferences with interstate commerce" (R. pp. 153, 154, f. 743) (9 N. W. (2d) 728). (Emphasis supplied.)

(2)

Customhouse Broker Is Not a Federal Instrumentality Engaged In Interstate Commerce.

Petitioner quarrels with the Minnesota Supreme Court decision which holds that Union Brokerage Company, petitioner herein, is not engaged in interstate commerce; that petitioner is not an instrumentality employed to protect the revenue of the United States; and an aid in the free flow of foreign commerce.

The Minnesota Supreme Court held that petitioner was an independent contractor, rendering personal services within the confines of the state of Minnesota; that petitioner was engaged in intrastate commerce for profit; and that the activities of petitioner in relation to interstate commerce were only remote and would not encroach substantially thereon (R. pp. 153, 154, f. 743). The Minnesota Supreme Court held further that the Minnesota Statutes requiring foreign corporations doing business in the state to first obtain certificates of authority. This is a reasonable requirement as applied to foreign corporations doing business in Minnesota. The failure of petitioner herein to first procure such certificate precludes it from maintaining this action.

Respondents, in such Minnesota Supreme Court case, contended that the State District Court committed error

in holding that petitioner was a federal instrumentality engaged in commerce. Respondents maintained that the business of petitioner was purely local and intrastate in character, and, that if it affected interstate commerce at all, it did so remotely and indirectly, and that petitioner was, therefore, subject to the provisions of the Minnesota Foreign Corporation Act. This position and contention of respondents was upheld by the Minnesota Supreme Court.

The Minnesota Supreme Court in deciding that petitioner was not a federal instrumentality nor engaged in interstate commerce, said:

> "In applying this principle so recently enunciated by the Supreme Court of the United States to the facts here presented, it is necessary to consider the character of the business in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. Duluth, S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55; People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955; State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347. True, under the Tariff Act customhouse brokers are required to be licensed in order to do business, but the sole purpose of that requirement is to protect the collection of tariffs due the federal government. State v. Wm. J. Oberle, Inc., supra. The office of plaintiff was situated in Noyes, Minnesota, and all of its records pertaining to that business were kept there. The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce. Its duty as an agent of the shipper was merely to pay the customs duties and make settlement subsequently with its principal, the shipper. Customhouse brokers represent private persons. They receive no fees or emoluments from the federal government. A customhouse broker's license authorizes the holder to transact

business in certain customs collection districts. He cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the department. We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. It is urged that because the customhouse broker pays the duties he has a direct and substantial connection with the commerce; that the commerce would be delayed if the duties were not paid. It must be borne in mind, however, that under the Tariff Act the shipper himself or his agent can perform this service. Article 1411, Customs Regulations of 1937, provides in part: '(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.' The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce" (R. pp. 152, 153, 154, ff. 741, 742) (9 N. W. (2d) 727, 728).

A case cited and quoted in the Minnesota Supreme Court decision is State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347.

In that case the state of Louisiana attempted to impose a state occupational tax on a customhouse broker, Wm. J. Oberle, Inc. The action was brought to compel the defendant customhouse broker at New Orleans to pay such occupational license tax based upon the broker's receipts from importers. The state contended that the

defendant was engaged in a purely private business and was subject to such general occupational tax. The defendant customhouse broker asserted that it was duly licensed by the Secretary of Treasury of the United States and could not be subjected to any occupational license tax as same would unconstitutionally burden a purely federal and quasi federal function and would interfere with the commerce laws of the United States. The lower state court held for the defendant customhouse broker on the ground that said state occupational tax law was unconstitutional in so far as same applied to customhouse brokers. The state appealed from this judgment, and Louisiana Supreme Court reversed, holding that a customhouse broker was subject to the Louisiana occupational tax. The Louisiana Supreme Court, in so holding, discusses very ably the activities of customhouse brokers, its relation, if any, to the interstate commerce, and the reason such occupational tax was valid as applied to customhouse brokers. That Court said:

> "(1) It is true that defendant is a customhouse broker, duly licensed by the Secretary of the Treasury of the United States under Section 641 of Article 1391 of the Tariff Act of 1930 (Transcript, p. 3).
>
> 1. But we fail to find any provision in the Tariff Act of 1930 to the effect that customhouse brokers are agents of the national government, discharging governmental functions.
>
> To the contrary, the Treasury Department defines a customhouse broker as including 'all persons, partnerships, corporations, and associations transacting customs business at a customhouse in behalf of others generally.' Art. 1392 of Tariff Act of 1930 (Transcript, p. 7).

Customhouse brokers represent private persons. They receive no fees or emoluments from the United States government, as testified by the president of defendant (Transcript, pp. 26, 27).

A customhouse broker's license only authorizes the holder to transact business in customs collection districts. They cannot represent a claimant before the Treasury Department, unless enrolled as attorney or agent in conformity with the requirements of the department (Department Circular No. 230, Treasury Department 42773). Arts. 1402 and 1403 of Tariff Act of 1930 (Transcript, pp. 13, 14). This is very far from being an agent of the United States, or being engaged in a governmental function. They are no more discharging governmental functions than are the lawyers licensed to represent their clients before the Treasury Department (Art. 1403, Transcript, p. 14). At the most, customhouse brokers are independent contractors, pursuing a private business for profit, and the fact that their occupation is regulated by law does not make those engaged therein government officials, or result in immunity from taxation.

In Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 269, 78 L. Ed. 622, the Supreme Court of the United States said:

> 'Appellant's license under the United States Warehouse Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehouse Act (7 U. S. C. A. No. 241, et seq.) confers upon licensees certain privileges and secures to the national government by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance

of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. Susquehanna Power Company v. State Tax Commission, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042; Fox Film Corporation v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Broad River Power Company v. Query, 288 U. S. 178, 180, 53 S. Ct. 326, 77 L. Ed. 685.'

. . . . . .

'The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co. v. State Tax Commission, supra; Broad River Power Company v. Query, supra. See Willcutts v. Bunn, 282 U. S. 216, 226, 230, 51 S. Ct. 125, 75 L. Ed. 304 (71 A. L. R. 1260).'

It is clear from the above decision that the mere extension of control over the business of customhouse broker by the national government does not withdraw it from a local tax, as defendant, in the enjoyment of the privilege under its license, is engaged in its own behalf, and not in behalf of the government, in the conduct of a private business for profit.

As the local tax claimed by the state in this case does not impose a burden upon a federal function, it presents no obstacle to the national policy in the control and administration by the government of its customs. Obviously, the concern of the government

is to see that the proper duties are collected, and the licensing of competent customhouse brokers is merely in promotion of the governmental policy. But neither the defendant, nor its business of customhouse broker, was, by the force of the license, converted into an agency or instrumentality of the federal government.

2. (2) We fail to see wherein the occupational license tax to which the state seeks to subject defendant, as a customhouse broker, would interfere 'with the commerce laws of the United States and particularly the importation and exportation of commerce,' as contended by defendant. The evidence fails to show that defendant is engaged in either. Defendant received its business from importers of merchandise, private persons (Transcript, pp. 26, 27). Defendant is not itself an importer of merchandise. If it were, it would not be licensed as a customhouse broker" (183 So. 347, 348).

One of the very few cases concerning the question as to whether or not a customhouse broker is a federal employee or agent or a federal instrumentality, is the case of Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918 E, 763 (cited in the Minnesota Supreme Court decision). That Court said:

"'He (customhouse broker) is invested with no part of the sovereign functions of the government. He is the agent of the importer, and deals with the government in that capacity. Moreover, his duties are not analogous to those of an executor or administrator. * * * He may act for whom and so far as he pleases. The license merely gives him the privilege of entering the goods for those who choose to employ him and for whom he chooses to perform such service.

* * * * *

> **" 'The character of the employment of a customhouse broker is private, as distinguished from public. His intervention is not necessary in the importation of goods.** The importer may make his own entry, or may employ any broker who has a license. The broker is paid by the importer, and is, as a matter of fact, his agent for the single transaction of entry. He performs no duties on behalf of the public, and the public is not concerned about his fees. **There are no considerations of public policy intervening which would affect the disposition of his earnings. His services stand upon no other basis than any other private employment.' "** (Emphasis supplied.)

The Minnesota Supreme Court decision also cited the New York case of People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955. In that case the state of New York enacted a so-called unincorporated business tax law upon various types of noncorporate enterprises competing with corporations in the state which are required to pay a corporate franchise tax measured by net income. That law exempted professions from its application. C. J. Tower & Sons was a partnership consisting of three partners devoting all their time to partnership affairs. It was held that the three partners were not practicing a profession within the meaning of the statute, and that, said partnership could have incorporated as such and transacted business as a customhouse broker. In such case, although the court did not make a direct finding that customhouse brokers are or are not engaged in interstate commerce, such court calls attention to the fact that the nature of the business is that of rendering personal service to patrons, importers, and exporters. It is clear, of course, that were customhouse brokers engaged in interstate commerce, or substantially so engaged, such broker

would not be subjected to the franchise tax of the state of New York.

A case very analogous to this case is that of Hopkins, et al., v. U. S., 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40. In that case Hopkins, et al., were engaged in the commercial business dealing in livestock in stockyards in Kansas City, Missouri, such stock being shipped from various states and to various states. Hopkins, et al., had agreed upon uniform rates to be charged for their services and the work performed was in the nature of personal service association. The question of whether or not Hopkins, et al., had attempted to restrain trade and commerce among the several states directly raised the question as to whether or not the said Hopkins, et al., were engaged in interstate commerce. In that case this Honorable Court delves deeply into the question as to what constitutes interstate commerce, and when such firm or person is subject to state laws, or beyond the operation of state laws, and, therefore, subject to federal law concerning interstate commerce and restraint of trade. Inasmuch as Hopkins, et al., were livestock brokers or agents engaged in performing personal service in connection with interstate commerce, which services, however, are merely collateral to interstate commerce.

This Honorable Court in holding that Hopkins, et al., livestock brokers, were engaged in purely local intrastate services, said:

> "On the contrary, we regard the services as collateral to such commerce, and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services, relating to the terms upon which they will render them, is not a contract in restraint of interstate trade or commerce."

This Court further said:

> **"The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner, whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of, and which itself constitutes, interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation.** Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself. They are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold." (Emphasis supplied.)

In the case of Blumenstock Bros. Adv. Agency v. Curtis Publishing Co. (252 U. S. 436), it was held that a business conduced by an advertising agency of placing, by contracts with publishers, advertisements for manufacturers and merchants, in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of publications themselves be such. It is held in the case of Parkersburg & O. River Transp. Co. v. Parkersburg (107 U. S. 691), that although wharves are related to commerce and navigation as acts and conveniences, yet being local in their nature, and requiring

special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belong to the states in which they are situated.

In the case of Hooper v. People of the State of California, 155 U. S. 648, 15 S. Ct. 207, it was held by this court that the business of marine insurance, like any other insurance business, is not commerce or an instrumentality thereof, but merely an incident thereto and therefore, the constitutional provision as to interstate commerce did not prevent a state from prescribing conditions upon which foreign insurance company may do business in the state or from enforcing such conditions.

In 12 Corpus Juris, page 35, Sec. 36 (9), it is stated:

> "The business conducted by brokers, and commercial merchants, or of exchanges of which they may be members, is not interstate commerce."

The work of a customhouse broker consists mainly in bookkeeping and paper work. It was held in Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. Rep. 436, that bookkeeping is not interstate commerce. The amount of the broker's fees are not set or regulated by the federal government. Petitioner's witness, Mr. Mackay testified:

> "* * * the collector has nothing to do with fees. Fees are a matter of agreement between the broker and his client; there are no set fees" (R. p. 115, f. 581).

From foregoing leading cases on the subject, it is clear that customhouse brokers are not federal employees, agents or instrumentalities; that their duties are purely personal in nature rendered at the port of entry where their business is situated, and, that if their activities affected interstate or foreign commerce, it did so but remotely.

C.

CUSTOM REGULATION AND RULING RECOGNIZES THE LOCAL AND INTRASTATE CHARACTER OF THE BUSINESS OF CUSTOM-HOUSE BROKERS

In scrutinizing the Tariff Act, particularly with reference to customhouse brokers, and the regulations promulgated by the Secretary of Treasury pursuant thereto, we find only one regulation which touches upon, and, which aids and assists in the interpretation which the federal government itself places upon the character and nature of the business of customhouse brokers. This regulation is Article 1410, Customs Regulations of 1937, in part, is as follows:

> "However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated,** and is prepared and qualified to render efficient service in such other district." (Emphasis supplied.)

Here the federal government expressly makes it a condition precedent for a broker who has a license in one district, and who desires to operate in another district, without further examination, to first satisfy the federal government that it has complied with the requirement that said broker "is authorized to do business in the state or states in which such other district is situated."

The Minnesota Supreme Court, in the decision involved herein, states that the United States Treasury Department has thereby placed a practical construction on the

character of the customhouse brokerage business as affecting commerce, by saying:

> "Subsequent to the adoption of this regulation, congress amended the tariff act in several respects, although the provisions governing customhouse brokers have remained substantially the same. By such regulation the treasury department has placed a practical construction on the character of the customhouse brokerage business as affecting commerce. It infers that it was the opinion of the treasury department that the statutory provision requiring a certificate of authority from a foreign corporation, as relating to such business, did not encroach upon interstate commerce. The provision that brokers may qualify to do business in more than one district, provided they are authorized to do business in the particular states in which such other districts are located, definitely implies that the department considers such business truly local and intrastate; and surely, if the business is intrastate when operated in two or more districts, it is equally intrastate when operated in a single district. Inasmuch as the tariff act was revised subsequent to the regulatory provision referred to without modifying this provision 'under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.' Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 115" (R. p. 156, f. 746) (9 N. W. (2d) 729).

Undoubtedly, the Commissioner of the Bureau of Customs recognizes the necessity of a customhouse broker complying with state laws and such compliance is entirely a matter between the broker and the state authority. In the early part of this brief such letter of instruction bearing date of September 1, 1942, addressed to Respondent Jensen herein is quoted in full but it is deemed advisable to again quote the salient part of the letter of instruction as follows:

"The holder of a customhouse broker's license is authorized to transact customhouse brokerage business at any port in the district in which the license is issued, so far as the customs laws and regulations are concerned. Compliance with state laws in the customs district covered by a license already in force is entirely a matter between the broker and authorities of the particular state involved.

By direction of the Commissioner:"

The practical construction and interpretation of a regulation or statute by the department charged with administration of duties pursuant thereto through a period of time bears great weight and such interpretation and construction will not be set aside or overturned unless clearly wrong. In the case of Swendig v. Washington Water Power Co., 265 U. S. 322, this Honorable Court with reference to the force and effect of Regulations, said:

"The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.' Logan v. Davis, 233 U. S. 613, 627."

Further in the case of United States v. Jackson, 280 U. S. 183, the Court on page 193, said:

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administra-

tion (cases cited); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

In the case of Aldridge v. Williams, 3 How. 9, 11 L. Ed. 469, it was held that any regulation within the authority given to the Undersecretary of Treasury by the act of 1832 are regulations prescribed by law.

It is clear that a customhouse broker is not the owner of the merchandise cleared through customs; that he does not direct nor control the buying, the selling nor routing of such shipment, and he at no time has physical contact with the merchandise. His services are strictly personal in nature, and are performed at such port of entry within the confines of the state wherein he operates. His business, therefore, is local and intrastate in character and private in character.

D.

THE MINNESOTA FOREIGN CORPORATION STATUTE IS A REASONABLE REGULATION AND REQUIREMENT, AND IS NOT AN OBSTRUCTION UPON INTERSTATE COMMERCE NOR INTERFERENCE THEREWITH

This court, no doubt, will read in its entirety the Minnesota Supreme Court case which petitioner seeks to have this Honorable Court reverse. The Minnesota Supreme Court has rendered a distinct service in so ably and carefully reviewing and analyzing the question here involved concerning the character of the business of a customhouse broker as applied to the commerce clause, and, has further arrived at the conclusion that the Minnesota Foreign Corporation Act is reasonable, and is not a "burden" upon commerce, nor an "obstruction," nor an "interference" therewith.

The Minnesota Supreme Court in so holding, said:

"While it is our duty fully to recognize this most recent trend in the construction of the commerce clause by the Supreme Court of the United States, we are unable to find, even in these recent decisions, any inclination on the court's part to interfere in purely local and intrastate matters. It is entirely consistent with these decisions and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our government during its century and a half of existence. Where congress has not stepped into the field of regulation because of the fact that some national public policy or concern is not involved, and where the business, as here, is local in character, relates only to personal services, is conducted for private profit, and is not an instrumentality of commerce, the courts should be loathe to suggest that the state cannot enforce a reasonable regulation for the benefit of its citizens such as the statute here in question. The provisions of this statute require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hardship upon the business. Nor do we think that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case. On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief. Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirement is a proper regulation for the state to prescribe, and that the constitutional power of congress is in no way impaired thereby" (R. pp. 157, 158, ff. 747-748) (9 N. W. (2d) 729, 730).

The reasonable requirements of the Minnesota Foreign Corporation Statute as applied to petitioner herein, a North Dakota corporation, to first obtain a certificate of authority to do business in the state of Minnesota before it could maintain this action, does not and can not interfere with the governmental functions of the federal government. The United States has suffered no loss in this case as a result of the customhouse brokerage business conducted by all parties hereto and neither has interstate commerce in any degree been obstructed, burdened or interfered with because petitioner did not qualify under the Minnesota Foreign Corporation Statute. The Tariff Act and Regulation promulgated pursuant thereto were never questioned nor were they construed by the trial court. Surely the compliance by the petitioner with the Minnesota Foreign Corporation Statute would have created no greater burden upon petitioner than upon Minnesota domestic corporations. The Minnesota Foreign Corporation Statute is but a reasonable requirement and can not and does not interfere with federal governmental functions. It is important to preserve the respective functional duties of the state as well as those of the federal government.

This court stated in the case of James V. Dravo Contracting Co., 302 U. S. 134 (page 148 thereof) as follows:

> "The possible importance of reserving to the state jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the states are acquired."

In the case of State Tax Commission v. General Trading Co., 10 N. W. (2d) 659, the Iowa Supreme Court in upholding the right of the state of Iowa to impose and

collect a use tax against a Minnesota corporation on retail sales made by traveling salesmen in Iowa but which concern had no place of business or agent located in Iowa, on page 664, said:

> "By compelling defendant to collect and pay the use tax, the tax commission seeks to compel defendant to operate on an equality with the retailers in Iowa who, as a part of their business operations, collect and pay the retail sales tax on all sales made by them. The justice of such equality undoubtedly accounts in large measure for the liberality of the court in undertaking to sustain use tax statutes. This liberality has necessitated considerable reorientation in this field of constitutional law. Much of the argument of counsel would be quite persuasive and convincing had the U. S. Supreme Court adopted the dissenting opinion in the Sears Roebuck case, written by Justice Roberts, with whom Chief Justice Hughes concurred. But the court determined otherwise. A precedent has been established which we are bound to follow."

The Minnesota Foreign Corporation Statute lays no direct burden, obstruction or interference with the collection of duties or on governmental functions with respect to the Tariff Act. Where a state law does not substantially interfere with or burden the federal government under many decisions of this court, the principle is recognized that the state may enforce its laws and requirements even though such laws may in a collateral, indirect or remote degree affect interstate commerce. This principal is further exemplified by the cases of Fox Film Corporation v. Doyal, 286 U. S. 123, 52 Sup. Ct. 546, 76 L. Ed. 1010; Thomson v. Union Pacific Railway Co., 9 Wal. 579, 19 L. Ed. 192; Trinity—Farm Construction Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469; Appeal of City of Dubuque, 5 N. W. (2d) 334.

The Minnesota Supreme Court decision is clearly right in its holding that the Minnesota Statutory requirement that petitioner must first obtain a certificate of authority to do business in the state before it can maintain this action, is a proper and reasonable state regulation "and that the constitutional power of congress is in no way impaired thereby" (R. p. 158, f. 747) (9 N. W. (2d) 730).

E.

A CUSTOMHOUSE BROKER DOES NOT AFFECT OR PROTECT THE PUBLIC REVENUE

Respondents fail to see why this case, in any degree whatsoever, is important to the federal government or the Department of Treasury. No claim has been made in the trial of the case in the lower court, or in the appeal to the Minnesota Supreme Court, that the public revenue in any way, shape, or manner is or was jeopardized. The United States government has not lost one cent on account of the customhouse broker activities of petitioner or respondents. The federal government by virtue of the Tariff Act and the regulations is fully protected in the collection of duties, as provided by law, and as heretofore set forth, through the medium of required bonds, the custody of shipments until the duty is paid, etc. None of the provisions of the Tariff Act nor of the regulations, nor the construction of the same, are involved in this controversy. The sole and only question is whether or not the state of Minnesota has the power to require a foreign corporation, before it can engage in business in the state of Minnesota, and have use of its courts, as a condition precedent thereto, to require such foreign corporation to first qualify under such state law, pay the franchise tax equal to that of domestic corporations, and

appoint a resident agent upon whom service of process might be made. Had petitioner obeyed the law of the state of Minnesota, it would have had the same privileges as are afforded domestic corporations. The Minnesota Supreme Court holds that a customhouse broker is neither a federal instrumentality nor engaged substantially in interstate commerce, and that such foreign corporation, the petitioner herein, is not immune or above the Minnesota State Law requiring compliance with its Foreign Corporation Statute.

The record clearly discloses that at no time in this case was the construction of the Tariff Act, Regulations, any other federal law, treaty or constitution, questioned. Such act and all regulations promulgated pursuant thereto were accepted without question by petitioner and respondents, the State District Court, and Supreme Court of the state of Minnesota. There is, therefore, no question of construction presented to this Court.

The only issue decided by the Minnesota Supreme Court, which petitioner is now requesting this court to be reviewed, is whether or not petitioner, Union Brokerage Company, a North Dakota Corporation, in order to legally function as an incorporated customhouse broker in the state of Minnesota, must first qualify under the Minnesota Foreign Corporation Act before it can transact customhouse brokerage business in the state and have the privilege of maintaining actions in the Minnesota courts. The regulations expressly provide that a licensed customhouse broker licensed to do business in one district may transact business in another district, without further examination, "provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated, and is

prepared and qualified to render efficient service in such other district." (Article 1410, Customs Regulations of 1937). (Emphasis supplied.)

This, it is submitted, is conclusive as to the issue involved.

CONCLUSION

Petitioner attacks and would have this Honorable Court reverse the clear and concise decision of the Minnesota Supreme Court. The enlightening and able opinion of Justice Youngdahl does not conflict with decisions of this court but on the other hand harmonizes therewith and with the Tariff Act and the Regulations. This case does not affect the public revenue. It is a case purely concerning the application of the Minnesota Foreign Corporation Statute as affecting corporate customhouse brokers such as petitioner who have set up, maintained and operated its business within Minnesota boundaries. The sole and ultimate question for this Court is the simple one of whether or not petitioner's customhouse brokerage business in a substantial way interfered with or obstructed the exercise of the granted power of congress to regulate interstate commerce. The Minnesota Supreme Court rightfully held that petitioner, in failing to comply with the reasonable requirements of the Minnesota Foreign Corporations Statute, could not maintain this action in any of the Minnesota courts.

This Honorable Court has recognized in many of its decisions that there are distinctions and limitations between interstate commerce or an instrumentality on one side, and on the other, mere incidents which may attend the carrying on of such commerce and which do not substantially affect, burden, obstruct nor interfere with interstate commerce. Surely the reasonable requirement of

the Minnesota Foreign Corporation Act, that petitioner qualify thereunder, has no bearing, direct or indirect, upon interstate commerce, the movement of foreign or interstate shipments nor the payment of duties.

The Minnesota Supreme Court decision followed this criterion and has harmonized its decision upon the distinctions and principles laid down by this Honorable Court.

Wherefore, respondents pray that the Minnesota Supreme Court decision be in all things sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 291.—October Term, 1943.

Union Brokerage Company, Petitioner, vs. Norman G. Jensen and Curtis M. Rime. } On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 8, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit brought in one of the lower courts of Minnesota by the Union Brokerage Company against Jensen and Rime for breach of fiduciary obligations in relation to Union's business, that of customhouse brokerage. The only defense to the suit with which we are concerned is the alleged disability of Union to resort to Minnesota's courts for want of compliance with her laws governing the transaction of business in the State as a foreign corporation. Minn. L. 1935, c. 200, Minn. Stat. 1941, c. 303. The Supreme Court of Minnesota sustained this defense, reversed the judgment in favor of the petitioner, and ordered the suit dismissed. 215 Minn. 207. We brought the case here to determine the important question whether enforcement of the Minnesota Foreign Corporation Act in this situation runs counter to federal law pertaining to customhouse brokers or is barred by the Commerce Clause. 320 U. S. 724.

Another claim that state authority must yield to controlling federal authority over interstate and foreign commerce is thus presented. It becomes necessary therefore to ascertain precisely what demand the State has here made, in relation to what transactions or activity it is making such demand, in what way federal authority has regulated such transactions or activity, and, finally, whether the Commerce Clause by its own force, in case federal law has not actually taken control, excludes the State from the exercise of the power it has here asserted.

For many years the petitioner, a North Dakota corporation, conducted a customhouse brokerage business at Portal, North Dakota, a port of entry from Canada by way of the Canadian Pacific Railway. In July, 1940, the Canadian Pacific re-routed most of its

shipments whereby they no longer entered the United States through Portal, but came through Noyes, Minnesota, with the result that more than 90% of Union's business was diverted from Portal. After November, 1940, at which time respondent Jensen resigned as officer of Union under circumstances giving rise to this suit, Union began to do business at Noyes and was doing business in Minnesota when it brought this suit. We shall outline the nature of this customhouse brokerage business only so far as is relevant to a consideration of our problem.

On goods shipped from Canada into this country the consignee of imported merchandise must "make entry" of them at the office of the collector of customs at Noyes either in person or by an authorized agent, and this must be done within forty-eight hours of the report of the vehicle which carried the goods unless the collector extends the time. Tariff Act of 1930, 46 Stat. 590, 722, 52 Stat. 1083, 19 U. S. C. § 1484(a). To make entry, the contents and value of the shipment must be declared and the tariff estimated, and the production of a certified invoice and a bill of lading is generally required. 19 U. S. C. § 1484(b)(c)(e)(g). Speed in making entry is vital, because goods cannot proceed to their ultimate destination until its completion. Apart from the fact that importers cannot always or even often make entries in person, the procedure makes demands upon skill and experience. The specialist in these services is the customhouse broker. In addition, he advances the duty in order that the goods may be cleared. 19 U. S. C. § 1505. The competence of the broker also bears on the efficient collection of customs duties in that the likelihood of additional assessment or refund after final determination of the duty is greatly lessened by accuracy in the tentative computation. But since errors and differences of opinion are inevitable, to insure collection of deficiencies the Government requires a bond prior to release. 19 U. S. C. § 1499; 19 Code Fed. Reg. § 6.27.

The business of customhouse brokers, it is apparent, demands a sense of responsibility and skill. To protect importers as well as the Treasury, Congress has authorized the Secretary of the Treasury to "prescribe rules and regulations governing the licensing as customhouse brokers of citizens of the United States of good moral character, and of corporations, associations, and partnerships, and may require as a condition to the granting of any license the showing of such facts as he may deem advisable as to

the qualifications of the applicant to render valuable service to importers and exporters." 46 Stat. 759, 19 U. S. C. § 1641(a). Elaborate regulations define the investigation to be made of the character and reputation of the applicant and his experience in customs matters. 31A Code Fed. Reg. § 11.3(b). The applicant is then directed to appear before an examining subcommittee which determines the "applicant's knowledge of customs law and procedure and his fitness to render valuable service to importers and exporters." 31A Code Fed. Reg. § 11.3(e)(f). On approval of a favorable report of the sub-committee by the Committee on Enrollment and Disbarment of the Treasury Department, a license issues. 31A Code Fed. Reg. §§ 11.3(f)(g), 11.4. "A licensed customhouse broker requires no further enrollment under the regulations in this part for the transaction, within the customs districts in which he is licensed, of any business relating specifically to the importation or exportation of merchandise under customs or internal-revenue laws." 31A Code Fed. Reg. § 11.5.

Union's license authorizes it to do business in District No. 34 which embraces both Portal, North Dakota, and Noyes, Minnesota. 19 Code Fed. Reg. § 1.2. The regulations require it to keep records of its financial transactions as customhouse broker, and its books and papers must be kept on file available for at least five years. 31A Code Fed. Reg. § 11.8. Business relations with those who have been denied a license because of moral turpitude or those whose license has been revoked are prohibited, and the licensee is under a duty not to promote evasion of obligations to the Government. Prompt payment and accounting of funds due to the Government or his client are required of the broker, and responsible and ethical conduct is generally enjoined. 31A Code Fed. Reg. § 11.9.

Does this scheme of federal regulation of the business of customhouse brokers preclude the requirement of Minnesota legislation which the Supreme Court of that State has enforced against Union? This brings us to a consideration of the precise demand against which Union protests. Minnesota has not singled out the customhouse brokerage business for legislation nor has she made requirements of foreign corporations doing customhouse brokerage business. What is in controversy is the applicability of a general law of Minnesota dealing with all foreign corporations. More specifically, § 20 of the Minnesota Foreign Corporation Act

requires a certificate of any foreign corporation doing business in the State as a prerequisite for maintaining an action in a court of that State. In addition a filing fee of five dollars and initial license fee of fifty dollars is exacted on making application for a certificate of authority. §§ 21(a)(1), 6. Such an application must contain the name of the corporation, its home state or country, the address of its principal office and that of its proposed registered office in Minnesota, the names and addresses of its directors and officers, a statement of its aggregate number of authorized shares and kindred information. § 5. The applicant must furthermore consent to the service of process upon it and appoint an agent upon whom service can be made, and in lieu of such appointment or if the agent cannot be found, service may be made upon the Secretary of State. §§ 5(6), 13(a)(2). A foreign corporation doing business in Minnesota without a certificate of authority is subject to a penalty not exceeding $1,000 and "an additional penalty not exceeding $100.00 for each month or fraction thereof during which it shall continue to transact business in this state without a certificate of authority therefor." § 20(c). Having obtained such a certificate, the corporation is required to file annual reports on the basis of which an annual fee is assessed. The measure of the fee is substantially the same as that set for domestic corporations but in its computation the property and gross receipts of a foreign corporation are allocated between those derived from within and those derived from without Minnesota and credit is given for the latter. § 15; cf. Minn. L. 1935, c. 230, § 2.

We have before us only one narrow aspect of this Minnesota legislation, namely the power of Minnesota to deny to Union access to its courts because it has not obtained a certificate required of all foreign corporations doing business in the State. We have not before us the taxing power of Minnesota over such a business as that of Union, for we do not know the extent or nature of the power to tax that Minnesota would claim against Union.

Of course Minnesota could not deny access to its courts to Union merely because it is engaged in the customs brokerage business. See *Second Employers' Liability Cases*, 223 U. S. 1, and *Douglas v. New Haven R. Co.*, 279 U. S. 377. But the limited and defined control which federal authority has thus far seen fit to assert over customhouse brokers does not deny to Minnesota the power to subject Union to the same demand which it makes of all other foreign

corporations seeking the facilities of Minnesota's courts. The federal requirements and this state requirement can move freely within the orbits of their respective purposes without impinging upon one another. The federal regulations are concerned solely with the relations of the customhouse broker to the United States and to the importer and exporter. The limited federal supervision of the financial activities of Union is restricted to these federal interests. Such supervision does not touch the interest of the State in the protection of those who have other dealings with Union, and therefore does not preempt appropriate means for their protection.

In a situation like the present, where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either. The proper attitude of mind for making such an accommodation is illustrated by *Federal Compress Co.* v. *McLean*, 291 U. S. 17. The Tariff Act of 1930 in this case, as the Warehousing Act in that case, confers upon licensees certain privileges, and secures to the Federal Government by means of these licensing provisions a measure of control over those engaged in the customhouse brokerage business. But such circumscribed control by the Federal Government does not imply immunity from control by the State within the sphere of its special interests. "The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit." *Federal Compress Co.* v. *McLean*, *supra* at 22-23. The state and federal regulations here applicable have their separate spheres of operation. The Federal Government has dealt with the manner in which customhouse brokerage is carried on. Minnesota, however, is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders. Union's business is localized in Minnesota, it buys materials and services from people in that State, it enters into business relationships, as this case, a suit against its former president, illustrates, wholly outside of the arrangements it makes with importers or exporters. To safeguard responsibility in all such dealings, dealings quite

outside transactions immediately connected with import and export, Minnesota has made the same exactions of Union as of every other foreign corporation engaged in similar transactions. The Federal Government has recognized that there is such a proper field for state regulation complementary to federal regulation, for the Treasury has provided that "a licensee having a license in force in one district may on application to the Committee be granted a license to transact business in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated". 31A Code Fed. Reg. § 11.6. Those who are responsible for protecting the interests of the revenue as well as of commerce have thus given emphatic indication that a State has a legitimate interest in the regulation of those engaged in the brokerage business within its borders. Where the Government has provided for collaboration the courts should not find conflict. See *Savage* v. *Jones*, 225 U. S. 501, and *Kelly* v. *Washington*, 302 U. S. 1.

This brings us to the final question. Does the Minnesota legislation do that which the Commerce Clause was designed to prevent—does it express hostility toward those engaged in foreign commerce or practically obstruct its conduct? What we have said makes it abundantly clear that the business of Union is related to the process of foreign commerce. As the trial court found, the customhouse broker in clearing the shipments, "aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States". The fees exacted by customhouse brokers "are charges upon the commerce itself"; they are charges for services afforded in the movement of goods beyond the boundaries of a State. See *Hopkins* v. *United States*, 171 U. S. 578, 591-2; *Wickard* v. *Filburn*, 317 U. S. 111, 122.

But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce. *S. C. Hwy. Dept.* v. *Barnwell Bros.* 303 U. S. 177; *Western Live Stock* v. *Bureau*, 303 U. S. 250. Such commerce interpenetrates the States and no undisputed generality about the freedom of commerce from state encroachment can delimit in advance the interacting areas of state and national power when Congress has not by legislation foreclosed state action. The incidence of the particular state enactment must determine whether it has transgressed the

power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process.

The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. Apart from any question of interference with foreign commerce such a requirement is plainly within the regulatory power of a State. But, as we have noted, while the business of Union is that of a customhouse broker, its activities are not confined to its services at the port of entry. It has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community. The same considerations that justify the particular regulatory measure alone before us, namely the requirement of a certificate of authority in the case of foreign corporations carrying on business other than customhouse brokerage, apply to the carrying on of Union's business in Minnesota. The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the State which those who are supervised must, as is often the case, themselves pay. See *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267.

We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause. Suffice it to say that we have not here a case of a foreign corporation merely coming into Minnesota to contribute to or to conclude a unitary interstate transaction, see *International Textbook Co.* v.

Pigg, 217 U. S. 91; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, nor of the State's withholding "the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205. The business of Union, we have seen, is localized in Minnesota, and Minnesota, in the requirement before us, merely seeks to regularize its conduct. Nor is there here an attempt to tax property or gross receipts earned outside the State, as was the case in *Looney* v. *Crane Co.*, 245 U. S. 178. In the absence of applicable federal regulation, a State may impose non-discriminatory regulations on those engaged in foreign commerce "for the purpose of insuring the public safety and convenience; . . . a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded." *Sprout* v. *South Bend*, 277 U. S. 163, 169.

The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause.

Judgment affirmed.

Mr. Justice JACKSON and Mr. Justice RUTLEDGE dissent.